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No.

IN THE

Supreme Court of the United States

CHARLES AMATI, *et al.*,

Petitioners,

v.

CITY OF WOODSTOCK, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the law enforcement exception to the Federal Wiretap Act, 18 U.S.C. § 2510(5)(a)(ii), operates to exempt the recording of all calls to and from a police department, including calls made on a phone line represented to its users as being unrecorded.

2. Whether municipalities are "entities" within the meaning of the Federal Wiretap Act, 18 U.S.C. § 2520(a), as amended by the Privacy Act of 1986.

PARTIES TO THE PROCEEDING

In addition to CHARLES AMATI, the Plaintiff specifically named in the caption, additional Plaintiffs before the court of appeals were TAMMY SANKEY-AMATI, CAROL BOLDA-MCCRAY, BRIAN C. BRUCHER, WILLIAM A. BRUCHER, REBECCA A. CIESIELSKI, JENNIFER L. CIESIELSKI, ANDREA P. LYNN-GOERKE, STEVEN GORSKI, CAROL GULLEDGE, ERIC GULLEDGE, BRUCE R. HILSTROM, ROBERT A. JACOBS, NORMA A. JACOBS, PHILLIP C. JACOBS, PAUL R. JACOBS, LAURA JACOBS-JENSEN, TERRI JANDRON, KURT JANDRON, JOHN E. JASPER, STEVEN J. KAROLEWICZ, ROBIN L. KAROLEWICZ, APRIL KAROLEWICZ, STEVEN M. KAROLEWICZ, ELAINE KLIMCZAK, ROBERT G. KLIMCZAK, JAMES W. KOURA, KATHY LONG, DONALD E. MADSEN, MICHAEL P. MCCLUSKEY, LAURA A. MILLER, ANTHONY H. OLSZEWSKI, MARY JO OLSZEWSKI, JENNIFER OLSZEWSKI-HANSEN, STACEY OLSZEWSKI-MORENO, KAROL A. PAVELT, THEODORE E. PIERCE, JOAN PIERCE, PEGGY J. PORTER, THOMAS B. PORTER, DIANNE R. REEVES, ROBERT N. SAUNDERS III, HARRY SCHROEDER, CINDY SCHULTZ, ESTATE OF STANLEY SCHULTZ, KATHI TAYLOR, THERESA VIERICK, SCOTT VIERICK, GEOFFREY M. WALKINGTON, MICHELLE R. WALKINGTON, TODD COUTURE, DONNA DYE, JEFFREY GOSSELINK, SARA JACOBS-EMRICSON, WENDY JOHNSON, ANN KERR, MICHAEL MCCLEARY, WILLIAM ROGERS, FREDERICK SPITZER, VICKIE SPITZER, AMBER SPITZER, JASON SPITZER and LOUIS VASQUEZ.

In addition to the CITY OF WOODSTOCK, Defendants before the Court of Appeals were HERBERT J. PITZMAN, individually and as the Chief of Police of the Police Department of the City of Woodstock, RANDALL BEU, individually and as a Police Officer of the Police Department of the City of Woodstock, and CHRISTINE KUTZ, individually and as the Communications Supervisor of the City of Woodstock Police Department.

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18 U.S.C. § 2707

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit in *Charles Amati, et al. v. City of Woodstock, et al.* is attached as Appendix A. The order of the district court in *Charles Amati, et al. v. City of Woodstock, et al.*, Case No. 94C50235 & 92C20347 (consolidated) dated May 27, 1998 is attached as Appendix B . The order of the district court dated February 24, 1998 is attached as Appendix C. The order of the district court dated July 26, 1995 is attached as Appendix D. The order of the district court dated August 10, 1993 is attached as Appendix E, and is reported as *Amati, et al. v. City of Woodstock, et al.*, at 829 F. Supp. 998 (N.D. Ill. 1993).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit ("Court of Appeals") was entered on May 4, 1999.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

From 1982 to 1992, the City of Woodstock maintained one of its telephone lines, (815) 338-7799, as an unlisted, unpublished and unrecorded telephone line at the police department. The line was available for use by department personnel to make and receive personal calls. From 1982 to 1992, the police department continuously represented 7799 as an unrecorded telephone line. The police department trained its employees that the 7799 line was to be used for personal calls, cautioned employees against extended personal use, and repeatedly reminded employees that the line was unrecorded. Directives, policy statements, training materials and other memoranda from the police department identified the 7799 line as an unrecorded phone line and a phone line available for personal use.

Police officers, telecommunications officers, narcotics officers, informants, arrested persons, union officials, and many other persons believed the line was unrecorded and thus participated in telephone conversations on 7799. In August of 1992, it was discovered that personal conversations on 7799 had been recorded since at least February of 1992, and that the defendants had listened to some of the recorded personal conversations.

The plaintiffs are sixty-three (63) persons who relied upon the representations of the defendants and engaged in personal telephone conversations on 7799 between February and August of 1992, under the belief that the line was unrecorded. The Defendants included the former Chief of Police, the former Assistant Chief of Police, the former Telecommunications Supervisor, and the City of Woodstock. The Police Chief and his assistant each underwent FBI training in electronic surveillance and wiretapping.

Over the course of a decade, the Woodstock police department published numerous documents representing that the 7799 line was unrecorded. The Woodstock police department also trained its employees consistent with these representations. The first such memo, dated December 10, 1982, issued to all personnel, stated in relevant part:

> As you know, all the telephone lines are taped with the exception of 338-7799. The line was intentionally left untapped to allow for personal calls, however, we request that you keep those calls brief and to a minimum. This policy will take effect immediately and be strictly adhered to.

In May of 1985, the Chief of Police published and implemented the 1985 telecommunications training and procedure manual which was subsequently used to train telecommunications officers. The training manual instructed its readers that 338-7799 was an "unlisted number designated for police personnel's personal calls" and was an "untaped line."

An additional communication referenced 7799 as an unrecorded line in 1986, three others followed in 1988, and even as late as April 1992, after defendants began recording 7799, the defendants published a memo fostering the belief that the 7799 line was still unrecorded.

In late May or early June of 1991, the Chief of Police sought and received authorization from the City Manager to continuously record 7799. After the City Manager authorized the taping of 7799, the individual defendants carried out that authorization. The recording of 7799 occurred from at least February 1992, to October, 1992.

On August 10, 1992, Plaintiff Charles Amati, a police officer for the City of Woodstock, made a telephone call to Plaintiff Bruce Hilstrom, a telecommunications officer for the City of Woodstock, using 7799. During their conversation Amati made a derogatory comment about the Assistant Chief of Police. The defendants subsequently listened to the recording of the Amati-Hilstrom conversation. Afterwards, the Chief of Police met with the Union President. During the meeting, the Chief disclosed the contents of the Amati-Hilstrom conversation, disclosed the contents of two other conversations that had been listened to, complained that administration was tired of hearing such comments, and announced for the first time that 7799 was recorded.

The defendants admitted that when the decision was made to record 7799, they knew personal calls were being made on 7799, and that personnel were encouraged to use the 7799 line to make personal calls. The defendants admitted that they never provided notice to employees that 7799 was recorded. The defendants admitted they did not obtain plaintiffs' consent to record their conversations on 7799, and that they did not obtain a warrant. The defendants also admitted that there was no police purpose served by recording the personal phone calls of the plaintiffs.

Each plaintiff engaged in telephone calls on 7799 during the relevant time period. No plaintiff was given notice from the defendants that calls on 7799 were being recorded. No plaintiff gave consent to the defendants to record their calls, and no plaintiff was served with a warrant authorizing the recording of their calls.

A. Procedural History

Upon learning their conversations had been recorded, a group of plaintiffs filed suit in December of 1992. A second group of plaintiffs filed suit in 1994, and the trial court consolidated the cases.

Before trial, the district court dismissed the City of Woodstock from the Federal Wiretap Act claims, finding that a municipality was not an entity within the meaning of the Act. (App. E at 34a). The district court denied plaintiffs' motion for judgment as a matter of law before the case went to the jury. (App. B at 14a). In February 1998, a jury rendered a verdict for the defendants. (App. C at 19a).

Plaintiffs filed post-trial motions seeking judgment as a matter of law, or alternatively, a new trial. The trial court denied the post-trial motions, and plaintiffs appealed to the Seventh Circuit. (App. B at 14a). On May 4, 1999 the Seventh Circuit affirmed the lower court and plaintiffs have timely filed their Petition for Writ of Certiorari herein. (App. A at 1a). The appeal at bar continues to pursue the theory that the defendants violated plaintiffs' rights under the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. § 2510, *et seq*.

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONFLICTS WITH THE DIRECTIVES OF THE SUPREME COURT, CREATES A SPLIT AMONG THE CIRCUITS, AND CONFLICTS WITH PRIOR DECISIONS OF THE SEVENTH CIRCUIT INTERPRETING THE LAW ENFORCEMENT EXCEPTION UNDER THE FEDERAL WIRETAP ACT, 18 U.S.C. § 2510(5)(a)(ii).

Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510, *et seq.*, (commonly referred to as the Federal Wiretap Act), regulates the clandestine interception of wire, oral, and electronic communications by the government. *Abbott v. Winthrop Harbor*, 1998 WL 433772 (N.D. Ill. 1998). Title III is part of a crime control act and its major focus is to clarify the confusion in the law governing surveillance and wiretaps by law enforcement officials by providing procedures for the use of electronic interception in combating criminal activities, particularly organized crime. *Jandak v. Village of Brookfield*, 520 F. Supp. 815, 819 (N.D. Ill. 1981) (citing S. Rep. No. 1097, 90th Cong., 2d Sess. (1968). *See, e.g., Alderman v. United States*, 394 U.S. 165, 175, 89 S. Ct. 961, 967 (1969) ("general rule under (Title III) is that official eavesdropping and wiretapping are permitted only with probable cause and a warrant"); *United States v. Jones*, 542 F.2d 661, 667 (6th Cir. 1976) ("pervasive theme of Title III is that electronic surveillance should be sharply curtailed and in no instance be undertaken without strict judicial authorization and supervision").

A. Civil liability under the Federal Wiretap Act

Section 2520 of the Federal Wiretap Act establishes a right to civil damages and other relief for violations, providing:

> In general, any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter may in a civil suit recover from the person or entity which engaged in that violation such relief as may be appropriate.

18 U.S.C. § 2520(a) (1998). (App. F at 73a).

The Act defines the term "intercept" to mean:

> The aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device.

18 U.S.C. § 2510(4) (1998). (App. F at 56a).

The Act defines an "electronic, mechanical, or other device" as:

> Any device or apparatus which can be used to intercept a wire, oral, or electronic communication . . .

18 U.S.C § 2510(5) (1998). (App. F at 57a).

> . . . other than (a) any telephone or telegraph instrument, equipment or facility, or any component thereof, . . . (ii) being used by a provider of wire or electronic communication service in the ordinary course of its business, or by an investigative or law enforcement officer in the ordinary course of his duties.

18 U.S.C. § 2510(5)(a)(ii). (App. F at 57a). Subsection 2510(5)(a)(ii) contains what is commonly referred to as the "law enforcement exception" and the "business exception". Applicability of the "law enforcement exception" is at issue in this case.

B. Purpose of the Federal Wiretap Act

The intent of the Act is to provide a prophylactic protection against warrantless wiretaps. *United States v. Giordano*, 416 U.S. 505, 514-515, 94 S. Ct. 1820 (1974). Congress deliberated and legislated with great detail when providing for circumstances when wiretapping is authorized. *Id.* Congress evinced a clear intent that statutory authority for wiretapping be used with restraint. *Id.* Wiretapping should not be a routine procedure. *Id.* The exceptions to warrantless wiretaps should thus be read narrowly. *In Re State Police Litigation*, 888 F. Supp. 1235, 1265 (D. Conn. 1995) *appeal dismissed* 88 F.3d 111 (2nd Cir. 1996). The purpose of the Federal Wiretap Act is to prohibit secret monitoring of communications using warrantless wiretaps. *United States v. Giordano, supra.* Application of the exceptions should thus turn on whether the privacy of telephone conversations has been invaded in a manner offensive to the purpose of the Federal Wiretap Act. *Campiti v. Walonis*, 611 F.2d 387, 392 (1st Cir. 1979).

The very nature of the Act is to impose limitations on the effectiveness of law enforcement agents in the interests of protecting the privacy of citizens. *Rodgers v. Wood*, 910 F.2d 444 (7th Cir. 1990). The Act represents Congress's careful balancing between the interests of the enforcement of criminal laws and the assurance of privacy in oral and wire communications. *Id.*

C. The Majority Analysis

In light of the Act's purpose, Federal courts, until *Amati*, have read the exceptions under the Federal Wiretap Act narrowly. In determining the applicability of the § 2510(5)(a)(ii) exceptions the Federal courts have consistently used an analysis of three factors.

First, courts look to the amount of notice the line's provider gave to users that the line was wiretapped. *United States v. Sababu*, 891 F.2d 1308, 1328-1329 (7th Cir. 1989); *United States v. Paul*, 614 F.2d 115, 117, *cert. denied*, 446 U.S. 941 (6th Cir. 1980); *James v. Newspaper Agency Corporation*, 591 F.2d 579, 582 (10th Cir. 1979); *United States v. Harpel*, 493 F.2d 346, 351-352 (10th Cir. 1974); *In Re State Police Litigation*, 888 F. Supp. at 1266 (D. Conn. 1995); *Jandak v. Village of Brookfield*, 520 F. Supp. 815, 823-824 (N.D. Ill. 1981); *Crooker v. United States Department of Justice*, 497 F. Supp. 500, 503 (D. Conn. 1980).

Second, courts look to whether there was a legitimate purpose for the wiretap. *James v. Newspaper Agency Corporation, supra*; *United States v. Harpel, supra*; *In Re State Police Litigation*, 888 F. Supp. at 1265-1266; *Jandak v. Village of Brookfield, supra*; *United States v. Banks*, 374 F. Supp. 321, 326 (D.S.D. 1974).

Third, courts look at the character of the intercepted conversation, especially as to whether the conversations intercepted were private or privileged. *Watkins v. L.M. Berry Company*, 704 F.2d 577, 582 (11th Cir. 1983); *Briggs v. American Air Filter Co., Inc.*, 630 F.2d 414, 420, n.8 (5th Cir. 1980); *United States v. Harpel, supra*; *In Re State Police Litigation, supra*; *Gerrard v. Blackman*, 401 F. Supp. 1189 (N.D. Ill. 1975); *United States v. Banks*, 374 F. Supp. at 323-326 (D.S.D. 1974).

D. The Premises Approach to Application of the Law Enforcement Exception

The three-part analysis consistently used by the courts has been challenged in the opinion below in favor of a premises-based exception to liability. In *Amati v. City of Woodstock*, the case at bar, one panel of the Seventh Circuit has launched a serious challenge to the existing interpretation of the law enforcement exception. (App. A at 1a). The opinion below clearly advocates the premises-based approach to the law enforcement exception. (App. A at 6a). In *Amati*, the Seventh Circuit held that all calls to and from a police department are routinely recorded in the ordinary course of law enforcement and, therefore, fall within the law enforcement exception. *Id.* By applying a premises-based exception to liability, the *Amati* court abandoned the issues of notice of recording to users of the line and the private or privileged content of the intercepted calls. The *Amati* court dismissed the resulting invasion of privacy as regrettable. (App. A at 7a).

However, a consensus of Federal courts have held to the contrary, finding that the Federal Wiretap Act's prohibitions against warrantless wiretaps apply to phone lines

coming into or emanating from a prison or a police station. *United States v. Lanoue*, 71 F.3d 966, 980 (1st Cir. 1995); *United States v. Amen*, 831 F.2d 373, 378 (2nd Cir. 1987), *cert. denied*, 485 U.S. 1021; *United States v. Paul*, 614 F.2d 115, 116, n.2 (6th Cir. 1980), *cert. denied*, 446 U.S. 941; *Campiti v. Walonis*, 611 F.2d 387 (1st Cir. 1979); *United States v. Harpel*, 493 F.2d 346, 351-352 (10th Cir. 1974); *In Re State Police Litigation*, 888 F. Supp. at 1265-1266; *George v. Carusone*, 849 F. Supp. 159 (D. Conn. 1994); *Crooker v. United States Department of Justice*, 497 F. Supp. 500, 502 (D. Conn. 1980). These courts have thus rejected the warrantless wiretapping of all calls coming into or emanating from a specific premises notwithstanding the fact that the premises is in some way connected to law enforcement. Therefore, the First, Second, Sixth, and Tenth Circuits have specifically rejected the "premises approach" to application of the law enforcement exception. *See Id.*

The Federal circuits have likewise rejected the premises approach to application of the business exception, ownership of the phone lines notwithstanding. *Watkins v. L.M. Berry & Company*, 704 F.2d 577, 582 (11th Cir. 1983); *Briggs v. American Air Filter Co., Inc.*, 630 F.2d 414, 420, n.8 (5th Cir. 1980); *James v. Newspaper Agency Corporation*, 591 F.2d 579, 581-582 (10th Cir. 1979).

PROBLEMS WITH THE AMATI ANALYSIS

The Seventh Circuit's analysis is flawed, and the majority analysis employed by the other circuits is the proper method for courts to determine the applicability of the law enforcement exception.

A. The opinion below creates an additional split among the circuits by requiring an evil motive to overcome the premises-based approach to the law enforcement exception

The opinion below creates a legal presumption in favor of a premises-based application of the law enforcement exception, which may only be overcome by proving evil motive on the part of the wiretapper. (App. A at 6a). However, this rationale employed by the Amati court is polar to the Second Circuit's ruling in *United States v. Townsend*, 987 F.2d 927 (2nd Cir. 1993). The Second Circuit held that 18 U.S.C. § 2511(a)(1) only requires intentional interception of communications; whether the defendant had a good or evil purpose in utilizing the automatic recording equipment is irrelevant. *United States v. Townsend*, 987 F.2d 927, 931 (2nd Cir. 1993). All that is relevant is that the defendants intentionally intercepted communications between two unknowing and unconsenting individuals. *Id.*

Moreover, the opinion below ignores the clear directive of the Supreme Court by advocating that it is ordinary for a police department to routinely record all telephone conversations to and from a police department. The Supreme Court has held that wiretapping should not be a routine procedure. *United States v. Giordano*, 416 U.S. 505, 514-15, 94 S. Ct. 1820 (1974).

B. Courts must analyze the quantum of notice to determine entitlement to the law enforcement exception

The Seventh Circuit's analysis in *Amati* also rejects the need for a determination whether notice was given to users of the line that the line was recorded. (App. A at 4a). The *Amati* court side-stepped the defendants' 10-year history of publishing the fact that the line was unrecorded and merely acknowledged the fact that the defendants did not inform the employees when the line became recorded. In place of a notice requirement, the Seventh Circuit introduced a new legal theory, finding that it was sufficient that some plaintiffs "may have known" of the recording of 7799. (App. A at 4a).

Contrary to the Seventh Circuit's proffered analysis, courts must evaluate the amount of notice given of wiretapping to determine whether the law enforcement exception applies. Many, if not most, Americans believe they do not live in a police state. Citizens assume phones they use are not wiretapped, the phones' location notwithstanding. Moreover, notice gives a caller the ability to protect his or her own privacy. After being informed a line is wiretapped, callers are on notice that private, personal, or privileged matters discussed on the line are being intercepted. Users can then knowingly choose to refrain from such conversations on recorded phone lines. Where notice of interception is absent, so also is the ability to protect privacy.

The present case demonstrates how failing to provide notice of wiretapping undermines the purpose of the Act. The Woodstock Police Department had an official policy that the 7799 line was not recorded. Employees were encouraged to use 7799 when making personal calls. Then the Police Department changed that policy without providing notice to users of the line.

Taking the facts as the jury found them and in a light most favorable to the defendants, the Chief of Police changed the policy and began recording without giving notice of the policy change to his personnel and to other users of the 7799 line. Thereafter, the users of the 7799 line continued using the line for personal, private, and privileged conversations under the assumption that the line was still unrecorded. Arrestees confided in their lawyers over the 7799 line. Union officials discussed negotiations over the 7799 line. Police officers conversed with their families about personal matters over the 7799 line, and narcotics officers spoke to confidential informants over the 7799 line. Recordings of all conversations were created and maintained by the defendants, and the defendants listened to some of the recorded conversations.

C. The opinion below fails to analyze the character of the intercepted communications

The *Amati* court held that the fact that personal calls were made on the line is irrelevant. (App. A at 7a). Notwithstanding the Seventh Circuit's theory, courts must analyze the character of the calls being wiretapped to determine whether the law enforcement exception applies. Routine wiretapping of personal or privileged calls without notice should not fall within the ordinary course of law enforcement. The consensus of Federal courts have properly held that the exceptions under § 2510(5)(a)(ii) do not apply to wiretapping of personal and privileged calls without notice. *See Watkins v. L.M. Berry Company, supra*; *Briggs v. American Air Filter Co., Inc., supra*; *United States v. Harpel, supra*; *In Re State Police Litigation, supra*; *Gerrard v. Blackman, supra*; *United States v. Banks, supra.* Contrary to the assessment of the court below, the invasion of privacy by wiretapping such calls is more than regrettable, it is forbidden by the Act.

The present case demonstrates the necessity of analyzing the character of the intercepted calls. Regardless of the motive of the defendants for recording the 7799 line, many personal and privileged communications were intercepted, recorded, and listened to by the defendants due solely to the unannounced wiretapping of the 7799 line. The Act imposes an affirmative duty not to intercept personal or privileged calls using a wiretap. *Watkins v. L.M. Berry Company, supra*; *Briggs v. American Air Filter Co., Inc., supra*; *United States v. Harpel, supra*; *In Re State Police Litigation, supra*; *Gerrard v. Blackman, supra*; *United States v. Banks, supra.* This affirmative duty applies with added force in a case like this one where the Police Department published official notice that the 7799 line was unrecorded and should be used for personal calls.

Finally, the Seventh Circuit's analysis in *Amati* should be rejected because lack of notice that a line is wiretapped coupled with lack of any affirmative duty to refrain from recording personal calls will inevitably lead to private and privileged conversations being recorded and listened to. Americans quite rightly assume phone lines are not wiretapped. *Griggs-Ryan v. Smith*, 904 F.2d 112 (1st Cir. 1990). If the Seventh Circuit's analysis is adopted, many users of phone lines will suffer the very privacy invasions that the Act was designed to prohibit.

D. Summary

Under the majority analysis outlined herein, plaintiffs are entitled to judgment as a matter of law. The defendants intentionally intercepted the private, personal and privileged conversations of the plaintiffs and did so without notice, without a warrant, and without consent. The defendants

intercepted, recorded, and listened to private, personal, and privileged conversations made on the 7799 line. The wiretap of the 7799 line was not performed in the ordinary course of law enforcement. There was repeated official notification that the line was not wiretapped.

The Woodstock Police Department did not have a legitimate purpose for the blanket recording of the personal, privileged, and private conversations that occurred on the 7799 line. Personal calls were expressly permitted on the 7799 line. The Federal Wiretap Act imposes an affirmative duty on the Woodstock Police Department not to record personal calls without notice. There is no legitimate purpose to record personal and privileged calls in the ordinary course of law enforcement. *Watkins v. L.M. Berry & Company, supra*; *Briggs v. American Air Filter Co., Inc., supra*; *United States v. Harpel, supra*; *In Re State Police Litigation, supra*; *Gerrard v. Blackman, supra*; *United States v. Banks, supra.*

Clearly, recording the plaintiffs' conversations on 7799 without a warrant, without notice, and without regard for the character of the calls was forbidden by the Act and was not in the ordinary course of law enforcement. *See Id.*

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONFLICTS WITH THE STATUTORY INTENT OF 18 U.S.C. § 2520, AS AMENDED IN 1986, BY HOLDING THAT A MUNICIPALITY IS NOT AN ENTITY UNDER THE OMNIBUS CRIME CONTROL AND SAFE STREETS ACT.

The Seventh Circuit, in the opinion below, affirmed the district court's granting of the City of Woodstock's motion to dismiss, holding that Title III does not apply to municipalities. In ruling that municipalities are exempt from suit under the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. § 2510, *et seq.*, the opinion below conflicts with § 2520(a) of the Federal Wiretap Act, as amended, and decides an important question of Federal law in a manner that conflicts with existing decisions of Federal circuit and district courts.

In 1968, Congress passed the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. § 2510, *et seq.* The Federal Wiretap Act sought to control and sharply curtail electronic surveillance, prohibiting surveillance without strict judicial authorization and supervision except under limited circumstances. *United States v. Jones*, 542 F.2d 661, 667 (6th Cir. 1976). At that time, under § 2520, civil liability was available only against "persons" who violated the Federal Wiretap Act.

Eighteen years later, in 1986, Congress passed the Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, 100 Stat. 1848 (1986) (Privacy Act of 1986). The Privacy Act of 1986 was a sweeping piece of legislation that amended the civil provisions of the Federal Wiretap Act,

and enacted privacy protections for emerging electronic technologies. Protections previously established for oral and wire communications were thereby extended to electronic communications and records. The Privacy Act of 1986 added protection for stored electronic data under the Stored Wire and Electronic Communications and Transactional Records Access Act, 18 U.S.C.A. § 2701, *et seq.* ("Stored Electronic Records Act").

In addressing civil liability provisions under Title III, the Privacy Act of 1986 provided new legislation establishing civil liability for violations regarding electronic communications, via 18 U.S.C. § 2707, and at the same time, also amended 18 U.S.C. § 2520 of the Federal Wiretap Act. Under the 1986 amendments, the term "entity" was added to § 2520(a), which had previously provided liability only against "persons" that violated the Federal Wiretap Act. The result of these changes was that both §§ 2520 and 2707 employed identical language referencing persons and entities as potential defendants. 18 U.S.C. § 2520(a); 18 U.S.C. § 2707(a). In amending § 2520 to add the term "entity," the Privacy Act of 1986 brought governmental entities, including municipalities, within the ambit of liability for violations of the Federal Wiretap Act.

While the Senate Report for the Privacy Act of 1986 did not specifically address Congress's addition of the term "entity" to § 2520(a), it did address Congressional intent regarding the Stored Electronic Records Act, and explained that the term "entity" as used in § 2707 of the Stored Electronic Records Act specifically included governmental entities:

> Subsection (a) of this proposed section provides that, except as provided in section 2703(e), any

> provider . . . aggrieved by any violation of this chapter may recover from any person or entity — including governmental entities — who knowingly or intentionally violated this chapter.

S. Rep. No 99-541, 99th Cong. 2d Sess., *reprinted in* U.S. Code Cong. & Admin. News, 3555, 3597.

Records of the House debates likewise show the House of Representative's intent was equally unequivocal:

> [r]ecovery may be had under [§ 2707] against a person or entity who violated the provisions of this chapter. This includes governmental entities who have violated the provisions of this chapter.

H.R. Rep. No. 647, 99th Cong., 2d Sess. 74 (1986).

Courts throughout the nation have subsequently held that Title III, as amended, provides for suits against governmental entities. The Fourth Circuit discussed municipal entity liability under the Privacy Act of 1986 in *Tucker v. Waddell*, 83 F.3d 688 (4th Cir. 1996). The Fourth Circuit noted that the legislative history of the Privacy Act of 1986 provides support for the conclusion that a private cause of action exists for violations of Title III by governmental entities, and stated:

> The term "person" refers not only to individuals, including agents and employees of governmental entities, but also to business entities such as partnerships, associations, and corporations. *See* 18 U.S.C. §2510(6), incorporated by reference in 18 U.S.C. §2711 (1994). Thus, the inclusion of the words "or entity" in §2707 strongly

> suggests that Congress intended to include governmental entities . . . (T)o interpret it otherwise would render that language mere surplusage.

Tucker v. Waddell, 83 F.3d 688, 690 (4th Cir. 1996). The same analysis used by the Tucker court can be applied with equal force to the inclusion of the words "or entity" in § 2520(a) of the Federal Wiretap Act.

The opinion below creates a contradictory holding in the Seventh Circuit regarding the issue of governmental entity liability under the Federal Wiretap Act. In *Amati*, the Seventh Circuit held that the Federal Wiretap Act specifically excludes municipalities from liability. (App. A, 6a). However, the opposite conclusion was reached by the Seventh Circuit in *Davis v. Zirkelbach*, 149 F.3d 614, *cert. denied*, 67 U.S.L.W. 3337, 119 S. Ct. 902 (7th Cir. 1998). In *Davis*, the Seventh Circuit likened a municipality's liability under the Federal Wiretap Act to that of municipal liability under 42 U.S.C. § 1983. The *Davis* court found that a municipal entity may be held liable under Title III using the analysis set forth by this Court in *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978). *Id.* at 621. Thus the court in *Davis* recognized that municipalities come within the ambit of entity liability under § 2520(a).

District Courts around the nation have likewise ruled that governmental entities may be held liable for violations of the Federal Wiretap Act. In *PBA Local No. 38 v. Woodbridge Police Dept.*, 832 F. Supp. 808 (D.N.J. 1993), the District Court held that principles of statutory construction and legislative history indicate governmental entities are subject to liability under § 2520(a). The *Woodbridge* court cited to a similar decision by the Northern District of Illinois in *Bodunde v. Parizek*, 1993 WL 189941 (N.D. Ill. 1993).

In *Bodunde*, the Northern District of Illinois held that § 2520(a) expressly provides that municipal entities may be held liable for violations, and noted that the term "person" already includes business entities, therefore "entity" as used in § 2520(a) must be a reference to the inclusion of governmental entities lest it be deemed redundant or superfluous language. *Id.* at 3. As the *Bodunde* court noted, it is a basic rule of statutory construction that, if possible, effect is to be given to each and every word, clause and sentence in a statute, and a construction that results in any portion of a statute being superfluous should be avoided. *Id.*; *See also Thurner Heat Treating Corp. v. National Labor Relations Board*, 839 F.2d 1256, 1259 (7th Cir. 1988).

Relying on *Abbott v. Village of Winthrop Harbor*, 1995 WL 51553 (N.D. Ill. 1995) [1998 WL 433772 (N.D. Ill. 1998) *appeal pending*] and *Bodunde v. Parizek, supra*, the Middle District of Tennessee held in *Dorris v. Absher*, 959 F. Supp. 813 *affirmed on other grounds* 1999 U.S. App. Lexis 11164 (M.D. Tenn. 1997) that a governmental entity is subject to liability under the Federal Wiretap Act. The *Dorris* court specifically addressed the district court's holding in *Amati*, regarding governmental entity liability. The *Dorris* court referenced *Amati*'s aberrant conclusion as follows:

> Only one court has held that the Act does not permit a civil action against a governmental entity despite the 1986 amendments. In *Amati v. City of Woodstock*, 829 F. Supp 998, 1002-03 (N.D.Ill. 1993), the court concluded that governmental entities may not be held liable for civil damages under the Act because they are not included in the definition of the term "person."

Dorris v. Absher, 959 F. Supp. at 820

The court in *Dorris* explicitly rejected the theory excluding municipal liability, pointing out that the *Amati* court refused to consider the language in the legislative history which indicated congressional intent to include governmental entities as civil defendants. *Dorris v. Absher*, 959 F. Supp at 820. The *Dorris* court went on to note that the 1986 Amendments changed the civil liability provision for violations in 18 U.S.C. § 2520, employing the same language in § 2520 that was used in § 2707. The court then cited to the Senate Committee Report which summarized § 2707, wherein the word "entity" was said to specifically include governmental entities. *Id.* at 820.

A. The opinions from the district and circuit courts below fail to give effect to the 1986 amendments to 18 U.S.C. § 2520(a)

In 1986 Congress amended an existing statute, 18 U.S.C. § 2520(a), adding a new class of violators subject to civil liability under the Federal Wiretap Act. That class of violators was "entities." As this Court has noted, when Congress acts to amend a statute, the conclusion must follow that Congress intended its amendment to have real and substantial effect. *Stone v. I.N.S.*, 514 U.S. 386, 115 S. Ct. 1537, 1545 (1995); *see also Reiter v. Sonotone Corp.*, 442 U.S. 330, 339, 99 S. Ct. 2326, 2331 (1979).

Therefore, in amending that portion of the statute, Congress intended to provide a real and substantial change to the previous class of potential defendants. Since the term "persons," present in the statute prior to the 1986 amendments already included business entities, Congress must have intended to bring another form of "entity" within the ambit of liability. The legislative history of the 1986

amendments makes clear that governmental entities were contemplated by Congress as additional defendants. This proposition is strikingly clear when the legislative history regarding the parallel statute, 18 U.S.C. § 2707, is reviewed.

This Court has not addressed the issue of governmental entity liability under the Federal Wiretap Act. Thus, the courts below have been left to employ their own devices in deciding whether the term "entity" in 18 U.S.C. § 2520 includes governmental entities. The attendant result is that this question has been and continues to be decided without uniformity. As a direct consequence, within certain jurisdictions governmental entities remain at liberty to violate the Federal Wiretap Act with impunity, and a question of Federal law stands unresolved.

CONCLUSION

The opinion below undermines more than thirty years of Federal Wiretap Act jurisprudence. By holding that the Federal Wiretap Act does not apply to governmental entities, the opinion below allows recovery against governmental agents, but bars recovery from the governmental entities that put the agents into action. Moreover, the opinion dilutes the protections of Title III by immunizing all of municipal government from liability, notwithstanding the fact that the statute was specifically designed to regulate, control, and limit governmental use of electronic wiretaps. If permitted to stand, the opinion below will sacrifice individual privacy rights only to make way for unfettered, unrestrained governmental privacy intrusions.

The opinion below also begins a journey toward a standardless analysis of the law enforcement exception. If permitted to stand, the lower court's ruling will permit the wholesale, routine interception of personal, private and privileged communications. It will turn the focus away from analyzing the facts surrounding the interception, to merely identifying the location of the interception and then exempting it from liability should that location prove to be a police department. Simply put, it cannot be the published policy of the police department not to record a phone line and at the same time be found to be in the ordinary course of law enforcement to record the line.

By granting the plaintiffs' petition for writ of certiorari, this Court may resolve the confusion among the Federal courts and define with certainty the persons or entities subject to liability under the Federal Wiretap Act. Also, by granting the plaintiffs' petition for writ of certiorari, this Court may

address and resolve the split among the circuits and regulate the analysis under which entitlement to the law enforcement exception is determined.

Accordingly, plaintiffs respectfully request that their petition for writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DATED AND DECIDED MAY 4, 1999

In the
United States Court of Appeals
for the Seventh Circuit

Nos. 98-2680 and 98-2681

CHARLES AMATI, *et al.*,

Plaintiffs-Appellants,

v.

CITY OF WOODSTOCK, *et al.*,

Defendants-Appellees.

Appeals from the United States District Court for the Northern District of Illinois, Western Division.
Nos. 92 C 20347 & 94 C 50235 —
Philip G. Reinhard, *Judge.*

ARGUED FEBRUARY 26, 1999 — DECIDED MAY 4, 1999

Before POSNER, *Chief Judge*, and CUDAHY and ROVNER, *Circuit Judges.*

POSNER, *Chief Judge.* This is a suit under the federal electronic-eavesdropping statute (Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C.

§§ 2510 *et seq.*) against the former police chief of Woodstock, Illinois, and other former members of the Woodstock police department, complaining about the taping of one of the department's telephone lines, (815) 338-7799, between February and October of 1992. (The Title III charge against the City of Woodstock itself was dismissed before trial.) The appeal presents questions, both substantive and procedural, of some novelty.

The plaintiffs, 63 in number, are employees and former employees of the police department, and their friends and family members, who used the line for personal calls not realizing (they say) that the calls were being recorded. A jury brought in a verdict for the defendants, and the plaintiffs appeal. The complaint included, besides the Title III charge, a charge under 42 U.S.C. § 1983 that the defendants had violated the Fourth Amendment (made applicable to state and local governmental action by interpretation of the Fourteenth Amendment), but the plaintiffs do not challenge the part of the verdict that rejected this theory of liability.

Their principal argument is that they were entitled to judgment as a matter of law on the Title III count because the evidence, even when construed as favorably to the defendants as the record will permit, established a violation. The taping was indeed a prima facie violation, see 18 U.S.C. § 2511(1), but the defendants argued, and the jury agreed, that it came within the statutory exclusion of eavesdropping "by an investigative or law enforcement officer in the ordinary course of his duties." 18 U.S.C. § 2510(5)(a)(ii). (See § 2510(4) for the connection between § 2511(1), the prima facie violation, and § 2510(5)(a)(ii), the exclusion.) It

is routine, standard, hence "ordinary" for all calls to and from the police to be recorded. Such calls may constitute vital evidence or leads to evidence, and monitoring them is also necessary for evaluating the speed and adequacy of the response of the police to tips, complaints, and calls for emergency assistance.

Title III also contains an exclusion for interceptions made in the "ordinary course of business." 18 U.S.C. § 2510(5)(a)(i). This is intended for situations in which a business or other entity, presumably one not involved in law enforcement (for otherwise this exclusion would duplicate the one for eavesdropping in the ordinary course of law enforcement), records calls to or from its premises in order to monitor performance by its employees. See, e.g., *Sanders v. Robert Bosch Corp.*, 38 F.3d 736, 740-42 (4th Cir. 1994); *Deal v. Spears*, 980 F.2d 1153, 1158 (8th Cir. 1992). A possible interpretation of the two closely related "ordinary course" exclusions is that they place beyond the reach of Title III cases in which the subscriber to a telephone line records calls on his line as opposed to intercepting calls on other people's lines. Indeed, the very term "interception" could be thought misplaced when applied to a subscriber's recording calls on his own line. But this interpretation, implicitly rejected in *Sanders* and *Deal*, is not pressed by the defendants, so we lay it to one side.

The Woodstock police department began recording all calls on all its lines in 1982 with the exception of calls on 338-7799, an unlisted line. A departmental memo that year to the employees explained that this "line was intentionally left untapped to allow for personal calls, however, we request

that you keep those calls brief and to a minimum." From time to time in subsequent years departmental memoranda or correspondence referred to the line as not being tapped.

The line was used for business as well as personal calls, particularly calls to and from public agencies and banks. The tapped lines, at the time, emitted a beep, and there was a concern that if such a line were used to acknowledge a call from a bank reporting a bank robbery in progress, the robber would take the call and realize that the robbery had been reported. In May of 1991, a call was made on 338-7799 complaining about a chlorine leak in a city pool. A city councilwoman was dissatisfied with the police department's response to the complaint, but investigation was stymied by the fact that the call had not been recorded. So the department decided to tape record calls on 338-7799. But it did not tell the employees, though many of them may have known about it. The taping was "officially" discovered when one of the defendants, reviewing a tape, heard one of the plaintiffs making derogatory comments about him and complained to the president of the local police union, telling him in the course of their conversation that all calls, including those on 338-7799, were being taped. This suit followed.

The plaintiffs argue that wiretapping cannot be "in the ordinary course of law enforcement" unless there is express notice to the people whose conversations are being listened to. The statute does not say this, and it cannot be right. If there is actual notice, as in *United States v. Sababu*, 891 F.2d 1308, 1329 (7th Cir. 1989), there will normally be implied consent. *United States v. Workman*, 80 F.3d 688, 692-94 (2d Cir. 1996); *United States v. Van Poyck*, 77 F.3d

285, 292 (9th Cir. 1996); *United States v. Horr*, 963 F.2d 1124 (8th Cir. 1992); *Griggs-Ryan v. Smith*, 904 F.2d 112, 116 (1st Cir. 1990); *United States v. Amen*, 831 F.2d 373, 379 (2d Cir. 1987). So if the "ordinary course" exclusion required proof of notice, it would have no function in the statute because there is a separate statutory exclusion for cases in which one party to the communication has consented to the interception. 18 U.S.C. § 2511(2)(c). In *United States v. Daniels*, 902 F.2d 1238, 1245 (7th Cir. 1990), which dealt with the recording of prisoners' calls — and incidentally questioned whether assuming a risk of being overheard is the same as consenting to being overheard — we made clear that the ordinary-course exclusion has its own domain. What that domain is, however, is a bit obscure.

Investigation is within the ordinary course of law enforcement, so if "ordinary" were read literally warrants would rarely if ever be required for electronic eavesdropping, which was surely not Congress's intent. Since the purpose of the statute was primarily to regulate the use of wiretapping and other electronic surveillance for investigatory purposes, "ordinary" should not be read so broadly; it is more reasonably interpreted to refer to routine noninvestigative recording of telephone conversations. (This interpretation may have much the same practical effect as the interpretation mentioned earlier in which "ordinary course" refers to recording calls on one's own line; for ordinarily when police record calls as part of an investigation they are recording calls on someone else's line.) Such recording will rarely be very invasive of privacy, and for a reason that does after all bring the ordinary-course exclusion rather close to the consent exclusion: what is ordinary is apt to be known; it

imports implicit notice. To record all calls to and from a police department is, for the reasons explained earlier, a routine police practice. If "ordinary course" of law enforcement includes anything, it includes that. *Jandak v. Village of Brookfield*, 520 F. Supp. 815, 821-25 (N.D. Ill. 1981); cf. *United States v. Daniels*, *supra*, 902 F.2d at 1245. The sparsity of case law on the question suggests not that the principle is dubious but that it is too obvious to have incited many challenges.

What would not be routine would be if the police, in order to trick people into making damaging admissions over the phone, announced that calls to and from the police department were *not* being recorded, and then recorded them anyway. Such a scheme would not be in the "ordinary" course of law enforcement; it would be extraordinary. Title III does not forbid all nonconsensual electronic eavesdropping, of course, but it does require a warrant for electronic eavesdropping that is not within one of the exclusions. 18 U.S.C. § 2516; *United States v. Cunningham*, 113 F.3d 289, 293-95 (1st Cir. 1997). In the absence of a warrant, the practice that we have just described would not (if we set to one side the possibility that anything a subscriber does on his own line is "ordinary") be protected by the law-enforcement exemption. See *In re State Police Litigation*, 88 F.3d 111, 121, 126 (2d Cir. 1996). The boundary is between routine noninvestigative uses of electronic eavesdropping and its use either as a tool of investigation (which requires a warrant) or as a device for intimidation, suppression of criticism, blackmail, embarrassment, or other improper purposes. See *United States v. Harpel*, 493 F.2d 346, 351-52 (10th Cir. 1974).

The plaintiffs charged, but the evidence did not compel the jury to find, that the defendants crossed this boundary. Remember that the decision to tap 338-7799 was precipitated by an official use of the line which showed that it had been a mistake to leave it untapped. Rather than being outside the ordinary course of law enforcement, the decision brought the line within that course. That personal as well as official calls were made on the line is irrelevant; *all* employees make personal calls on company phones; if all the lines are taped, as is the ordinary practice of police departments, then the recording of personal as well as of official calls is within the ordinary course. Although eventually the recording of calls on 338-7799 "caught" a plaintiff criticizing another member of the force, the purpose of recording calls on the line was not (or so at least a reasonable jury could find) to intimidate the people using the line. The invasion of privacy was regrettable, but if all Congress had cared about was the protection of privacy it would not have written an exception for electronic eavesdropping in the ordinary course of law enforcement into the statute; it would in every case have required consent — and of both parties to the conversation, as in some state statutes, rather than just of one party.

The plaintiffs also complain about the dismissal of the City of Woodstock as a defendant, which was, however, proper, because Title III does not allow for suits against municipalities. 18 U.S.C. § 2510(6). They also challenge the instructions. Rather than instructing the jury that it must decide whether the recording of calls on 388-7799 was within the ordinary course of law enforcement, the judge instructed it to decide whether the taping had been done "secretly." The plaintiffs did not object to the instruction when given,

and so will not be heard to complain about it now, Fed. R. Civ. P. 51; *Vaughn v. King*, 167 F.3d 347, 353 (7th Cir. 1999); *Knox v. Indiana*, 93 F.3d 1327, 1333 (7th Cir. 1996); *Samara Bros., Inc. v. Wal-Mart Stores, Inc.*, 165 F.3d 120, 130 (2d Cir. 1998) — especially since the instruction was more favorable to them than the law. Taping could be said to be done "secretly" if the persons whose conversations are taped are not told about it, and so understood the instruction collapsed the ordinary course of law enforcement exclusion into the consent exclusion. "Secretly" also connotes, however, like "surreptitiously," which the judge replaced in the instructions with "secretly" lest some jurors not know what "surreptitiously" means, doing something sneakily, implying a purpose to trap. Some district court cases say that the ordinary-course defense does not extend to "surreptitious" taping, e.g., *Abbott v. Village of Winthrop Harbor*, 1998 WL 433772, at *11 (N.D. Ill. 1998); *George v. Carusone*, 849 F. Supp. 159, 164-65 (D. Conn. 1994), but this is a potentially misleading usage and should be avoided.

The plaintiffs challenge the district court's refusal to certify the suit as a class action. The challenge is mysterious on two grounds. First, it is impossible to see how the plaintiffs would have been better off at trial had the case been litigated as a class action. Class actions are rarely tried, but when they are the trial proceeds the same way it does in an ordinary case — there are no special *trial* procedures for class actions as such, though if the suit is particularly complex, as some nonclass actions are and some class actions, including this one, are not, the ordinary trial procedures may have to be modified. Fed. R. Civ. P. 23(d)(1); *Watson v. Shell Oil Co.*, 979 F.2d 1014 (5th Cir. 1992). We

have never before heard it argued by a plaintiff who lost at trial that he would have won had his suit been certified as a class action.

Second, it makes no sense for a losing party to take an *unconditional* appeal from a refusal to certify his case as a class action. For if the court of appeals affirms the merits judgment and reverses the denial of class certification, the effect will be to extinguish the rights of all the class members who had not opted out of the litigation. *Robinson v. Sheriff of Cook County*, 167 F.3d 1155, 1157-58 (7th Cir. 1999), and cases cited there. The wise plaintiff will either let sleeping dogs lie, or make his appeal from the denial of class certification conditional on the court of appeals' reversing the merits judgment. Cf. *Council 31 v. Ward*, 978 F.2d 373, 380-81 (7th Cir. 1992). It is true that if he tries the latter tack, he may be met by the rule against one-way intervention in class actions, on which see Fed. R. Civ. P. 23(c); Advisory Committee Notes to 1966 Amendment, Subdivision (c)(3); *Premier Electrical Construction Co. v. National Electrical Contractors Ass'n, Inc.*, 814 F.2d 358, 362-67 (7th Cir. 1987). The rule bars potential class members from waiting on the sidelines to see how the lawsuit turns out and, if a judgment for the class is entered, intervening to take advantage of the judgment. But the way Rule 23(c) prohibits this practice is by requiring the district judge to make an early determination whether the suit is to proceed as a class action and who shall be bound by the judgment as members of the class. The rule does not appear to be addressed to the case in which class certification is denied; and anyway that is a case in which the defendants can protect themselves against "one-wayness" by filing a cross-appeal challenging

the denial of class certification in order to bind unnamed class members to the judgment should it be affirmed. The defendants did not do this here. Since the plaintiffs, having lost on the merits in this court, cannot possibly benefit from class certification, and the defendants are not seeking it, we shall treat the issue as moot, and so not pursue further the question whether a conditional appeal from the denial of class certification violates the rule against one-way intervention in class actions.

Rule 68 of the Federal Rules of Civil Procedure authorizes a defendant to make an offer of judgment before trial. A plaintiff who turns down the offer and then does worse at trial has to pay the defendant's costs (and his own). Does worse, but still wins; for if he loses, he would have to pay the defendant's and his own costs anyway. Rule 68 bites only when the plaintiff wins but wins less than the defendant's offer of judgment. The defendants here offered each of the plaintiffs $2,000 under Rule 68 but made the offer conditional on all the plaintiffs' accepting it. Some did accept the offer but not all and so the offer lapsed. The plaintiffs argued that conditioning the offer on acceptance by all of them was invalid and that the proper remedy was to make the defendants pay each of the plaintiffs who tried to accept the offer the $2,000. The district judge agreed that the condition was invalid but he thought this made the offer inoperative, and so he refused to enforce it. The defendants argue that the condition was valid and therefore the offer was not validly accepted by the plaintiffs who tried to do so. Thus both sides disagree with the judge's invalidating the offer, though the defendants support his bottom line, since even if their offer was invalid, as the judge thought, and so

ineffective to shift costs if the plaintiffs won (but won less than the offer), the plaintiffs lost and so there was no cost shifting.

We cannot find anything in the rule, or the case law, to support the view that the condition which the defendants imposed — all the plaintiffs must accept the offer of judgment for it to be effective — is invalid, or if it is that the offer is therefore enforceable. The only appellate case we have found upheld such a condition, *Lang v. Gates*, 36 F.3d 73, 75 (9th Cir. 1994), and in support of it we note that since the purpose of an offer of judgment is to settle the case in advance of trial, conditioning it on acceptance by all plaintiffs may be necessary to head off the trial. Especially where there are many plaintiffs, which can create a serious holdout problem. Suppose the offer of judgment had been unconditional and 62 of the 63 plaintiffs had accepted it. The sixty-third would be in a position to extract a handsome settlement offer from the defendants, who otherwise would have to incur the expense of a trial. The defendants would have spent $124,000 (62 x $2,000) to avert a trial, and surely would be willing to spend another $10,000, say, to achieve that objective. Knowing from this example that the best position to be in is that of the holdout, the other plaintiffs — those who we assumed would have accepted the defendants' offer — would in fact have been reluctant to accept it. Each would have had an incentive to hang back in the hope that the others would accept it. This is why the defendants' form of offer in this case promoted rather than retarded the objectives of Rule 68; it made it less likely that the case would go to trial.

Against this it has been argued that if different plaintiffs value the case differently the defendant can be sure that his offer will be turned down and he will avoid having to pay the costs of at least some of the plaintiffs, and that this is unfair. See *Tocwish v. Jablon*, 183 F.R.D. 239 (N.D. Ill. 1998), and cases cited there discussing state-law counterparts to Rule 68. Suppose plaintiffs A and B value their claim at $1,500, and plaintiff C values his claim at $2,500. Then the defendant's $2,000 offer will be sure to be rejected if conditioned on unanimous consent, and assuming the defendant guessed right and the plaintiffs win $2,000 apiece at trial, he will avoid paying A's and B's costs, even though they would have accepted his offer had he not imposed the unanimity condition.

But A's and B's real quarrel in such a case, it seems to us, would be with the asymmetry built into Rule 68: only a defendant can make a settlement offer that (if not accepted and the other party does worse than the offer) will let a losing party out of having to pay costs. A plaintiff has no right to demand a Rule 68 offer and therefore no right to demand that the defendant configure the offer in a way that will assure its acceptance. Proposals to "symmetrize" Rule 68 have been made, see, e.g., Committee on Rules of Practice and Procedure, "Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure," 102 F.R.D. 407, 432-37 (1984); Geoffrey P. Miller, "An Economic Analysis of Rule 68," 15 *J. Legal Stud.* 93, 123-25 (1986), but not adopted.

A better point for the plaintiffs than the possibility of their having varying estimates of the value of the suit is the

possibility already discussed of holdout behavior by one of the plaintiffs, but now directed at extracting concessions from the other plaintiffs rather than from the defendants. Suppose that 62 of the 63 plaintiffs are eager to accept the defendant's rule 68 offer, but the sixty-third balks unless the other plaintiffs will agree to give him 10 percent of their share of the settlement. It would be odd if, negotiations breaking down, the plaintiffs who wanted to accept the defendant's offer would be barred from obtaining costs should they prevail at trial. They could not enforce the offer, because they could not accept it in accordance with its condition of unanimity; but it can be argued that the conditional offer, though valid, should be ineffectual to block the plaintiffs who had signified their desire to accept it from obtaining costs. That is not argued here (costs are not in issue, as we saw), and so we need not attempt to resolve the issue. The plaintiffs are seeking to enforce an offer that they were precluded from accepting by the nonfulfillment of the unanimity condition, and this they cannot do.

So we find no basis for disturbing the judgment. But we point out that the plaintiffs' side of the case has not lost utterly. (815) 338-7799 is no longer a recorded police line; it is now the phone number of the plaintiffs' lawyer.

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS DATED MAY 27, 1998

United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	Philip G. Reinhard

* * *

CASE NUMBER	94 C 50235 92 C 20347
DATE	May 27, 1998
CASE TITLE	Amati vs. City of Woodstock

* * *

DOCKET ENTRY:

* * *

(10) ■ [Other docket entry] For the reasons set forth on the reverse, the court denies plaintiffs' renewed motion for judgment as a matter of law or, in the alternative, for a new trial.

(11) ■ [For further detail see order on the reverse side original minute order.]

s/ Philip G. Reinhard

* * *

Appendix B

(Reserved for use by the Court)

ORDER

Plaintiffs moved for a directed verdict on their Federal Wiretap and Fourth Amendment claims at the close of their case and at the close of all evidence, and both motions were denied. Following a jury verdict in favor of defendants on all of plaintiffs' claims, plaintiffs have moved, pursuant to Fed.R.Civ.P. 50, for judgment as a matter of law and, pursuant to Fed.R.Civ.P. 59, for a new trial.

Rule 50 permits a court to grant a motion for judgment as a matter of law when there is no legally sufficient evidentiary basis for a reasonable jury to find for a party on an issue. *Tincher v. Wal-Mart Stores, Inc.*, 118 F.3d 1125, 1129 (7th Cir. 1997). Upon such a motion, the court must examine the evidence presented, combined with any reasonably drawn inferences, and determine whether that evidence sufficiently supports the verdict when viewed in the light most favorable to the non-moving party. *Id.* The motion may be granted only if no rational jury could have found for the non-moving party. *Id.*

The court has carefully reviewed the evidence here, in a light most favorable to defendants, and finds it sufficiently supports the verdict. It cannot be said that no rational jury could have found for defendants on the evidence presented. The motion for judgment as a matter of law is, therefore, denied.

A motion for a new trial, under Rule 59, may be granted where the verdict is against the weight of the evidence, the

damages are excessive or if, for other reasons, the trial was not fair to the moving party. *Mid-America Tablewares, Inc. v. Mogi Trading Co., Ltd.*, 100 F.3d 1353, 1367 (7th Cir. 1996). In this case, plaintiffs point to the following as bases for their motion for a new trial: (1) the court's instruction 18, which used the term "secretly," was faulty because the Federal Wiretap Act does not require proof that an interception was secret and also because the court did not define "secretly;" (2) the use of a special interrogatory asking whether any interception was done "secretly" served to overemphasize and compound the confusion resulting from court's instruction 18; (3) the court erred in not defining the term "secretly" as used in the special interrogatory when asked to do so by the jury during deliberations; (4) testimony concerning the net worth of the individual defendants prejudiced plaintiffs; (5) evidence of certain documents pertaining to an intergovernmental agreement confused the issues and prejudiced plaintiffs and (6) the use of a general verdict form overemphasized defendants' innocence. Alternatively, plaintiffs also seek a new trial against defendant, the City of Woodstock, contending it was improperly dismissed as a defendant.

The first three points raised by plaintiffs are interrelated with the common thread being the contention that the jury was not given a definition of the term "secret." During the course of developing the instructions, the court determined that the word "surreptitious" might be difficult for the jury to understand. Consequently, the court concluded "secret" was simpler to understand and meant the same thing as surreptitious. The court did not consider it necessary to define the term "secretly" as it is a word whose definition jurors

would be familiar with. As for the request from the jury during deliberations, there is nothing about the request, the short remaining deliberation that followed or the fact that the jury put quotes around "secretly" in the special interrogatory form that indicates any confusion on the part of the jury. At best, these things show a recognition by the jury of the critical nature of a finding as to whether the recording was done secretly.

As for evidence of net worth, plaintiffs, as well as defendants, agreed that evidence of net worth was relevant because of plaintiffs' claims for punitive damages. Such evidence was presented to the jury before the punitive damages claim was removed from the case, and was stricken thereafter.

Regarding the documents pertaining to the intergovernmental agreement, the court admitted those as relevant to show motive as it related to plaintiffs' claim for punitive damages. Such evidence was not allowed to show a defense to liability.

Plaintiffs make only a passing argument in a footnote that the use of a general verdict form "overemphasized defendants' innocence." There is simply no suggestion in this case that the use of a general verdict form as to defendants in any way affected the jury deliberations. The use of such a form was a logical way in which to present the issues to the jury.

Lastly, the court denies plaintiffs' motion for a new trial as to the City of Woodstock. The court stands by its earlier

decision to direct a verdict in favor of the City as there was no evidence to support a jury verdict that the complained of conduct resulted from any official policy or custom of the City.

For the foregoing reasons, the court denies plaintiffs' motion for judgment as a matter of law and for a new trial.

APPENDIX C — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, WESTERN DIVISION DATED AND FILED FEBRUARY 24, 1998

United States District Court
Northern District of Illinois
Western Division

Case Number: 92cv20347

Charles Amati, et al.

v.

Herbert J. Pitzman, et al.

JUDGMENT IN A CIVIL CASE

■ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury rendered its verdict.

* * *

IT IS ORDERED AND ADJUDGED jury verdict in favor of all defendants and against all plaintiffs on all claims. Court enters judgment on the verdict.

Michael W. Dobbins,
Clerk of Court

Date: 2/24/98

s/ Susan Wessman
Susan Wessman, Deputy Clerk

Appendix C

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF ILLINOIS

Name of Assigned Judge or Magistrate Judge: Philip G. Reinhard

* * *

Case Number: 92 cv 20347

Date: February 24, 1998

Case Title: Amati, et al. v. Pitzman, et al.

* * *

DOCKET ENTRY:

* * *

(10) ☒ [Other docket entry] Jury deliberation continued from 9:00 a.m. to 12:00 p.m. Jury verdict in favor of all defendants and against all plaintiffs on all claims. Trial ends — Jury. Court enters judgment on the verdict.

* * *

s/ Philip G. Reinhard

* * * *

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS DATED JULY 26, 1995

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS

Name of Assigned Judge or Magistrate Judge	PHILIP G. REINHARD
Case Number	94 C 50235 consolidated with 92 C 20437
Date	July 26, 1995
Case Title	Amati, et al. v. City of Woodstock, et al.

* * *

MOTION:

Defendants, City of Woodstock, Pitzman and Beu's, motion to dismiss plaintiff's complaint.

DOCKET ENTRY:

* * *

(10) ☒ [Other docket entry] For the reasons stated on the reverse, the court grants Beu's motion to dismiss the complaint as to himself, grants the City's motion to dismiss

Appendix D

(11) ☒ [For further detail see ☒ order on the reverse of . . . the original minute order form.]

s/ Philip G. Reinhard
Judge Philip G. Reinhard

* * *

(Reserved for use by the Court)

ORDER

This cause (No. 94 C 50235) is filed by a group of plaintiffs (Group A) who originally sued defendants (No. 92 C 20347), the City of Woodstock (City), Herbert Pitzman and Randall Beu, and a new group of plaintiffs (Group B) who now seek to file suit against the City, Pitzman and Beu in Counts I - VIII. Both Group A and Group B plaintiffs also name Christine Kutz as a new defendant in the new complaint (Counts IX - XI). Defendants, the City, Pitzman and Beu, now seek dismissal, collectively, of Counts I - VIII brought by the Group B defendants. Defendant Kutz has answered Counts IX - XI. This court has previously ruled on these same defendants' motion to dismiss in No. 92 C 20347. *See Amati v. City of Woodstock*, 829 F. Supp. 998 (N.D. Ill. 1993).

I. *Beu*

Beu seeks dismissal of the complaint in No. 94 C 50235 because it names him as a defendant but contains no allegations of wrongdoing against, and seeks no relief from,

him. Plaintiffs do not respond to Beu's motion to dismiss. Because the complaint contains no allegations against, and seeks no relief from, Beu, the court dismisses the complaint in its entirety as to Beu.

II. *City*

A. *Count I*

The City seeks dismissal of Count I in No. 94 C 50235, brought pursuant to section 2520 of the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. § 2520 (Omnibus Act), because a municipality is not an "entity" as that term is defined under the Omnibus Act. This court has previously ruled, *see Amati v. City of Woodstock*, 829 F. Supp. 998, 1001-03 (N.D. Ill. 1993), that the City is not covered by the Omnibus Act. The court finds no reason to change its prior ruling. The court has read *Abbott v. Village of Winthrop Harbor*, No. 93 C 4642 (N.D. Ill. Jan. 27, 1995), *Organizacion JD Ltda. v. United States Dept. of Justice*, 18 F.3d 91 (2d Cir. 1994), and *PBA Local No. 38 v. Woodbridge Police Dept.*, 832 F. Supp. 808 (D.N.J. 1993), and respectfully disagrees with those courts' conclusions and stands by its original interpretation of the Omnibus Act.

B. *Counts II - IV*

The City has previously sought dismissal of similar causes of action in No. 92 C 20347 for the same reasons now raised for dismissal here. The court denies the City's motion to dismiss Counts II - IV in No. 94 C 50235 for the same reasons set forth in its memorandum opinion and order in No. 92 C 20347. *See Amati*, 829 F. Supp. 998.

Appendix D

III. *Pitzman*

Pitzman seeks dismissal of Counts V - VIII for the same reasons urged by the City for dismissal of Counts I - IV, except as to Count VI Pitzman does not raise the lack-of-custom or policy argument and he does not raise, of course, the covered entity argument as to the Omnibus Act. As to Counts VI - VIII, the court denies Pitzman's motion to dismiss those counts for the same reasons it denies the City's motion to dismiss Counts II - IV. Regarding Count V, the court denies Pitzman's motion to dismiss because, as the court previously ruled in No. 92 C 20347, the Omnibus Act does not require an actual listening to of a conversation but, rather, is triggered by a recording alone. Further, the question of whether the Sixth Circuit, in *Boddie v. ABC*, 731 F.2d 333 (6th Cir. 1984), overruled that portion of *Smith v. Wunker*, 356 F. Supp. 44 (S.D. Ohio 1972), finding that interception under the Omnibus Act required an actual hearing of, or listening to, a recorded conversation, is of no consequence as this court is not persuaded by the reasoning in *Wunker*.

For the foregoing reasons, the court grants Beu's motion to dismiss the complaint as to himself, grants the City's motion to dismiss Count I and denies the City's and Pitzman's motions to dismiss Counts II - IV (the City) and Counts V - VIII (Pitzman).

APPENDIX E — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, WESTERN DIVISION DATED AUGUST 10, 1993

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

Case No. 92 C 20347

Charles Amati, Carol Bolda, Brian C. Brucher, Edward R. Burton, Peggy K. Burton, Jennifer L. Ciesielski, James M. Davis, John Doe, a minor by his next friend, Steven Gorski, Jeffrey Gosselink, Carol Gulledge, Wally B. Hajost, Diane L. Hajost, Bruce R. Hillstrom, Esther K. Hohol, Vincent M. Hohol, John J. Hohol, Jr., John J. Hohol, Norma A. Jacobs, Robert A. Jacobs, John E. Jasper, Valerie A. Johns, Richard M. Johns, John B. Johnson, Wendy Johnson, Steven J. Karolewicz, Robin L. Karolewicz, Karen A. Karpavicius, Donna Karpavicius, Ann M. Kerr, Timothy R. Kerr, Elaine Klimczak, Robert G. Klimczak, James W. Koura, Daniel E. Latham, Dana L. Latham, Dennis E. Leard, Donald E. Madsen, Michael J. McCleary, Michael P. McCluskey, Laura A. Miller, Robert Minerly, Anthony H. Olszewski, Mary Jo Olszewski, Theodore E. Pierce, Joan Pierce, Thomas B. Porter, Peggy J. Porter, Shiela R. Readel, Jeffrey J. Rhode, JoAnn Richards, Cindy Schultz, Stanley Schultz, Vickie Spitzer, Kathi Taylor, Yvonne Vasquez, Dilia Vasquez, Louis Vasquez, Jr., Louis Vasquez,

Plaintiffs,

Appendix E

Charles Amati, Anthony J. Olszweski, and Louis Vasquez, as Representatives of the Absent Class Members,

v.

The City of Woodstock, Illinois, a municipal corporation, Herbert J. Pitzman, individually and as Chief of Police of the Police Department of the City of Woodstock, and Randall Beu,

Defendants.

ORDER

INTRODUCTION

On November 25, 1992, plaintiffs filed a 28-count complaint against defendants, the City of Woodstock, Illinois (City), Herbert J. Pitzman, individually and as the Chief of Police of the City's police department, and Randall Beu, a City police officer. Counts 1, 2, 11, 12, 21, 23 and 24 arise under the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. § 2510 *et seq.*, (Crime Control Act) and the court has jurisdiction over these counts pursuant to 28 U.S.C. § 1331. Counts 3, 4, 13, 14 and 25 arise under the Civil Rights Act of 1871, 42 U.S.C. § 1983, and the court has jurisdiction over these claims pursuant to 28 U.S.C. §§ 1331, 1343. In Counts 5, 6, 15, 16 and 26 plaintiffs present claimed violations of the Illinois Constitution, Article I, section 6.[1]

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1. In their complaint, plaintiffs cite to Article 6 of the Illinois Constitution as guaranteeing the right to privacy. Article 6 governs

(Cont'd)

Appendix E

In Counts 7, 8, 17, 18 and 27 plaintiffs allege a violation of their right to privacy, giving rise to the common law tort of intrusion into plaintiffs' seclusion. Counts 9, 10, 19, 20, 22 and 28 arise under the Illinois Eavesdropping Act, 720 ILCS 5/14-1 to -9 (1993). The court has supplemental jurisdiction over the state law claims in Counts 5-10, 15-20, 22 and 26-28 pursuant to 28 U.S.C. § 1367.

Each defendant has filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). The court will address the three motions herein.

FACTS[2]

The relevant facts are as follows. The police department for the City maintained a telephone system for the transmission of telephone communications to and from the police department. Several of the lines were taped, and, since

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(Cont'd)
the judiciary. Article I, section 6 of the Illinois Constitution protects against invasions of privacy. The court will assume, for purposes of the pending notions to dismiss, that plaintiffs meant to refer to Article I, section 6. Plaintiffs are to file an amended complaint to conform to the court's order.

2. In reviewing a motion to dismiss, all well-pleaded allegations in the complaint are accepted as true, and all reasonable inferences are drawn in favor of the plaintiff. *Dimmig v. Wahl*, 983 F.2d 86, 87 (7th Cir. 1993). The court will not dismiss a complaint unless it is clear there is no set of facts a plaintiff would prove consistent with the pleadings that would entitle him or her to relief. *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984); *Murphy v. Lane*, 833 F.2d 106, 107 (7th Cir. 1987).

at least 1982, the police department maintained one untapped telephone line for the private, personal telephone communications of police department personnel. On December 10, 1982, the police department issued a departmental correspondence which stated in relevant part:

DICTAPHONE RECORDER.

> The recorder is now hooked up and in full operation.
>
> * * *
>
> As you know, all the telephone lines are taped with the exception of 338-7799. The line was intentionally left untaped to allow for personal calls * * *.
>
> This policy will take effect immediately and be strictly adhered to.

(Compl. ¶ 5, Exh. A).

Plaintiffs offer evidence showing this practice was still in effect as of January 2, 1988 (*See* Compl. Exh. B). According to plaintiffs, at all relevant times they believed telephone communications made on the private line were not intercepted by a mechanical or electronic device. However, in June 1991, Pitzman sought and received authorization from the City Manager, Dennis Anderson, to surreptitiously wiretap the private line. This practice of intercepting calls on the private line continued until October

1992 when the private line was disconnected. In August 1992, Pitzman told plaintiff Vasquez that the police department had been intercepting telephone calls on the private line since June 1991. This was the first notice to plaintiffs that the City's "official" policy had been abandoned.

DISCUSSION

I. THE CITY'S MOTION TO DISMISS

A. Count 1

In Count 1, plaintiffs maintain the City violated section 2511(1)(a) of the Crime Control Act, 18 U.S.C. § 2511(1)(a),[3] in that the City intentionally intercepted telephone communications made by plaintiffs on the private line. The City argues the Crime Control Act is inapplicable to municipalities. According to the City, the Crime Control Act does not include a municipal corporation within its definition of "person." Plaintiffs argue a later amendment to the Crime Control Act altered the meaning of "person" to include municipalities within its ambit.

According to section 2511(l)(a), "except as otherwise specifically provided in this chapter any *person* — (a) who

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3. Although plaintiffs label Count 2 as the "Omnibus Crime Control and Safe Streets Act," §§ 2510-21 are labeled "Wire and Electronic Communications Interception and Interception of Oral Communications" and is commonly referred to as the Federal Wiretapping Act. The section at issue, 18 U.S.C. § 2510 *et seq.*, is also commonly referred to as Title III of the Crime Control Act.

intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication" shall be found in violation of the statute. (emphasis added). 18 U.S.C. § 2510(1)(a) (Supp. 1993). "Person" is defined as "any employee, or agent of the United States or any State or political subdivision thereof, and any individual, partnership, association, joint stock company, trust, or corporation[.]" 18 U.S.C. § 2510(6) (1970). The City notes that when Congress originally enacted the Crime Control Act, it specifically mentioned the exclusion of governmental units. In commenting on the definition of "person," Congress notes the definition's applicability to the entire chapter, and states:

> The definition explicitly includes any officer or employee of the United States or any State or political subdivision of a State. But see *Pierson v. Ray*, 87 S. Ct. 1213, 386 U.S. 547 (1967). Only the governmental units themselves are excluded. Compare *Monroe v. Pape*, 81 S. Ct. 473, 365 U.S. (1961); *Wilford v. California*, 352 F.2d 474 (9th 1965). Otherwise the definition is intended to be comprehensive.

S. Rep. No. 1097, 90th Cong., 2d Sess. (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2179. Historically, courts have interpreted sections 2510(6) and 2520 to exclude governmental units from liability under the Crime Control Act. *See Spock v. United States*, 464 F. Supp. 510, 513-14 n.4 (S.D.N.Y. 1978).

Plaintiffs argue the Electronic Communications Privacy Act of 1986 (Privacy Act of 1986), 18 U.S.C. § 2701 *et seq.*,

amended the Federal Wiretapping Act to authorize recovery of civil damages against any person or entity.[4] According to section 2520, "any person whose wire, oral or electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter may in a civil action recover from the person or entity which engaged in that violation such relief as may be appropriate." 18 U.S.C. § 2520(a) (Supp. 1993). Plaintiffs argue inclusion of "entity" within section 2520(a) means Congress intended victims to be able to recover from governmental units.

The starting point for interpreting a statute is the language of the statute itself. *Milwaukee Gun Club v. Schulz*, 979 F.2d 1252, 1255 (7th Cir. 1992). Absent a clearly expressed legislative intent to the contrary, the statutory language must be regarded as *conclusive*. *Schulz*, 979 F.2d at 1255. If the statutory language is clear, it is unnecessary to look beyond that language to interpret the statute. *Schulz*, 979 F.2d at 1255. The court must not only look to the particular statutory language at issue but also to the language and design of the statute as a whole. *Schulz*, 979 F.2d at 1255.

In the present case, the statute at issue contains a definition of person which expressly excludes local governmental entities. *See* 18 U.S.C. § 2510(6). While the Congressional comment regarding this provision cites to *Monroe v. Pape*, 365 U.S. 167 (1961), such legislative history

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4. Originally, the Crime Control Act authorized recovery of civil damages against a "person" and made no mention of an "entity." *See* 18 U.S.C. § 2520 (1968).

is of no consequence in light of the plain language of section 2510(6). The definition of person contained in section 2510(6) was intended to be applied chapter-wide. *See* 18 U.S.C. § 2510. Furthermore, section 2520, the remedial portion of the Crime Control Act, originally provided for recovery of civil damages against "any person who intercepts, discloses, or uses * * * such communications." Thus, under the original provisions, it is clear that Congress intended to preclude local governmental entities from those who could be sued civilly under the Crime Control Act.

Of course, the Crime Control Act has since been amended, particularly section 2520, and hence, the question of Congressional intent is now subject to a difference of opinion. Plaintiffs look to section 2520 as evidence that Congress intended to amend the Crime Control Act in 1986 to include local governmental entities as potential civil defendants, whereas defendants point to section 2511(a)(1) as indicative of a contrary Congressional intent. Neither provision is dispositive, however.

Even after the 1986 amendment, section 2510(6) remains unchanged. It still unequivocally excludes local governmental entities from its definition of person and continues to apply to the entire chapter. While it is true that the amended version of section 2520 now contains the language "person or entity" when referring to parties against whom a civil action may be brought, such language alone does not create an ambiguity in the statute or constitute a clear expression of Congressional intent to include local governmental entities as potential civil defendants under the Crime Control Act. First, section 2511 was also amended

and now refers in one of its subsections to "person or entity." *See* 18 U.S.C. § 2511(3)(a).[5] There was no provision comparable to section 2511(3)(a) in the original statute. *See* 18 U.S.C. § 2511. No other provision of section 2511 contains the "person or entity" language. Nevertheless, to maintain consistency with the alternative language contained in section 2511(3)(a), it would have been necessary for Congress to have placed similar language in the remedial provisions of section 2520, which it did. Thus, there exists a reasonable explanation for the addition of the word "entity" in section 2520 which is short of a Congressional intent to amend the statute to include local governmental entities as potential defendants. Furthermore, in view of this likely explanation for the inclusion of the term "entity," it cannot properly be considered superfluous. *But see Bodunde v. Parizek*, No. 93 C 1464, 1993 WL 189941 *3 (N.D. Ill. May 28, 1993) ("entity" as used in section 2520(a) would be superfluous if not referring to governmental entity).

Second, the legislative history pertaining to the 1986 amendments to sections 2511 and 2520, while relatively

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5. While there is no clear explanation in the legislative history as to why the term "entity" was used in section 2511(3)(a), it should be noted that the overall purpose of the 1986 amendment was to include electronic communications within the protections of the original Crime Control Act. *See* 1986 U.S. Code Cong. and Adm. News, pp. 3555-57. In several instances in the "purpose" portion of the legislative history, the discussion refers to persons or businesses. It may be that Congress wished to recognize a difference between persons and business entities in the context of electronic communications. It would certainly have been reasonable for Congress to have done so without effectuating a change in its definition of "person" in section 2510(6).

detailed, is silent as to the reason behind the use of the term "entity." 1986 U.S. Code Cong. and Adm. News, pp. 3555-3606. It is unreasonable to conclude that Congress intended to subject an entire class of defendants to potential liability without any expression of that intent in the legislative commentary. It becomes even more peculiar that Congress would not utter any insight into its intent to do so if in fact it effectuated such a substantial change in the law by simply adding one word to the statute. This is especially so when one considers that the express definition of "person" went untouched by the 1986 amendment.[6]

As always, intent is the lynchpin of statutory interpretation. Congress' original intent was to exclude local governmental entities such as the City from civil liability under the Crime Control Act. There is simply insufficient evidence, whether in the express language of the statute or in the legislative history applicable thereto, to disrupt the clear and previously expressed Congressional intent. Accordingly, the City is dismissed from Count 1.

The court is unpersuaded by plaintiffs' reliance on *Steve Jackson Games, Inc. v. United States Secret Serv.*, 816 F. Supp. 432, 441-42 (W.D. Tex. 1993), wherein the plaintiff asserted, *inter alia*, a claim against the Secret Service pursuant to 18 U.S.C. § 2510 *et seq*. There the court analyzed the definition of "intercept" and did not address whether the

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6. The entire legislative history of the 1986 amendment, including the portion related to the purpose of the amendment, is curiously silent as to any intent to include local governmental entities as potential defendants.

United States could be held liable under 18 U.S.C. § 2510 *et seq*. Compare with *Asmar v. United States Dep't of Treasury*, 680 F. Supp. 248, 250 (E.D. Mich. 1987) (specifically addressing whether § 2520 creates a private cause of action against the federal government and holding to the contrary; despite the reference to "entity," Congress must include a specific statutory waiver of sovereign immunity before a court will find the United States has consented to suit).

B. COUNT 3 — SECTION 1983

In Count 3, plaintiffs allege the interception of telephone communications over the police department's private line from June 1991 to October 1992 constitutes a violation of the Fourth and Fourteenth Amendments, giving rise to a cause of action under section 1983. The city argues plaintiffs' complaint avers its policy was one of protecting their privacy and, therefore, there can be no liability under section 1983.

Municipalities may be held liable under section 1983 only for acts which the municipality has officially sanctioned or ordered. *Fiorenzo v. Nolan*, 965 F.2d 348, 350 (7th Cir. 1992) (quoting *St. Louis v. Praprotnik*, 485 U.S. 112 (1988)). Only those municipal officials who have final policymaking authority may by their actions subject a municipality to section 1983 liability. *Fiorenzo*, 965 F.2d at 350 (quoting *Praprotnik*, 485 U.S. at 123). "[A] municipality is not liable merely because the official who inflicted the alleged constitutional injury had the discretion to act on its behalf; rather, the official in question must possess final authority to establish municipal policy with respect to the challenged action." *Fiorenzo*, 965 F.2d at 351. Whether an official has

final policymaking authority is a question of state law. *Fiorenzo*, 965 F.2d at 350; *Zook v. Brown*, 865 F.2d 887, 895 (7th Cir. 1985).

Plaintiffs argue the decision by Pitzman and Anderson to depart from "official" policy and surreptitiously intercept the police department's private line became the City's policy. Plaintiffs assert Pitzman and Anderson were responsible for establishing final policy regarding interception of the police department's telephone lines under Woodstock ordinances.[7] The court finds a question of fact exists as to whether Pitzman and Anderson occupied positions with final policymaking authority regarding the interception of police department telephone lines such that their departure from "official" policy became, in itself, a municipal policy. It is true, as the City notes, that plaintiffs refer to the police department's original, constitutional practice as its official policy. *See* Compl., ¶¶ 5, 6. However, plaintiffs also aver that the interception of telephone communications over the private line "constitutes a policy and practice of the City within the meaning of . . . section 1983, in that, the interception was made pursuant to a pervasive practice instituted by the Chief of Police of the Police Department, authorized by the City Manager[.]" (Compl. ¶ 82). Plaintiffs have alleged facts sufficient to support the existence of an unconstitutional policy for purposes of a Rule 12(b)(6) motion to dismiss. *See Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, __ U.S. __, 113 S. Ct. 1160 (1993).

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7. Plaintiffs recite several Woodstock ordinances setting forth the duties of the Chief of Police and the City Manager in their memorandum in response to the City's motion to dismiss.

Appendix E

The City, alternatively, argues that even if plaintiffs' allegations support a section 1983 claim, the Federal Wiretapping Act preempts such a cause of action. At the outset, the court notes plaintiffs' section 1983 claim is not premised on the Federal Wiretapping Act. Rather, plaintiffs allege the City's policy or custom violated the Fourth Amendment, giving rise to a cause of action under section 1983.

In determining whether a federal statute precludes reliance on section 1983 as a remedy for a Fourth Amendment claim, the crucial consideration is what Congress intended. *See Smith v. Robinson*, 468 U.S. 992, 1011 (1984). In other words, a court must determine whether Congress intended a certain statute to occupy an entire field to the exclusion of all other federal remedies. *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1 20-22 (1981). The City argues the Federal Wiretapping Act embodies Congress' interpretation of the extent of Fourth Amendment rights inherent in oral, wire and electronic communications to the exclusion of section 1983. The court rejects this argument.

The Seventh Circuit has held, "[a]lthough Title III's suppression remedy [of the Crime Control Act] has its roots in the Fourth Amendment exclusionary rule, it is not simply co-extensive with that rule." *United States v. Dorfman*, 690 F.2d 1217, 1227 (7th Cir. 1982), *aff'd sub nom. in United States v. Williams*, 737 F.2d 594 (7th Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985); *see also United States v. Eschweiler*, 745 F.2d 435, 437 (7th Cir. 1984) (addressing contentions that recorded conversations violated Fourth Amendment and Title III of the Crime Control Act), *cert. denied*, 469 U.S.

1214 (1985); *Halperin v. Kissinger*, 606 F.2d 1192, 1201-02 (D.C. Cir. 1979) (discussing the differences between the Fourth Amendment and Title III of the Crime Control Act), *aff'd in part and dismissed in unrelated part*, 452 U.S. 713 (1981). In so holding, the Seventh Circuit recognized that the Federal Wiretapping Act did not occupy the field of privacy interests at stake in the Fourth Amendment to the exclusion of all other federal remedies. In light of *Dorfman*, it logically follows that the Federal Wiretapping Act does not preempt a section 1983 action based on a claimed Fourth Amendment violation.[8]

Moreover, were the court to hold the Federal Wiretapping Act precludes a section 1983 action, plaintiffs would be foreclosed from recovering against the City *at all* in the instant case. Previously (*see* Part II, A *supra*), the court determined municipalities were not proper defendants under the Federal Wiretapping Act. If the court were to also find the Federal Wiretapping Act preempts section 1983 claims, the City would be able to indiscriminately wiretap oral, wire and electronic communications without fear of liability. The court does not believe Congress intended such a result, despite the City's contention that such a result would not be "stunning." The Supreme Court's holding in *Monell* was clear: municipalities are not immune from section 1983

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8. While the question of preemption in this context at first blush concerns the continued vitality of a federal statute (42 U.S.C. § 1983) it runs more deeply. To preempt § 1983 in this way would be to eviscerate civil remedies under the Fourth Amendment against the state and its political subdivisions. The conclusion that a statute whose sole purpose is to effectuate a constitutional remedy has been preempted must rest on grounds far more solid than those apparent here.

liability. For this reason, the court is unpersuaded by the City's argument that a section 1983 action would undermine Congress' plan as set forth in the Crime Control Act.

Additionally, there is a general presumption against congressional repeals of prior statutes by implication. *Samuels v. District of Columbia*, 770 F.2d 184, 194 n.7 (D. D.C. 1985). "Such repeals are strongly disfavored on the ground that Congress is normally expected to be aware of its previous enactments and to provide a clear repeal if it intends to extinguish an extant remedy." *Samuels*, 770 F.2d at 194 n.7. "Section 1983, standing alone, cannot withstand preemption by a more comprehensive statutory remedy designed to redress specific unlawful actions, . . . unless the statute in question manifests a congressional intent to allow an individual a choice of pursuing independently rights under both the statutory scheme and some other applicable federal statute." *Zombro v. Baltimore City Police Dep't*, 868 F.2d 1364, 1367 (4th Cir.), *cert. denied*, 493 U.S. 850 (1989). A comprehensive remedial framework specifically designed to redress a victim's alleged grievances evidences congressional intent to foreclose a section 1983 action. The court disagrees with the City's contention that the Federal Wiretapping Act is such a comprehensive statute. It is true the Federal Wiretapping Act contains specific, detailed provisions regulating the interception of wire, oral or electronic communications. *See, e.g.*, 18 U.S.C. § 2518 (Supp. 1993). However, the Federal Wiretapping Act does not contain particularized administrative conciliation and mediation procedures for redressing grievances. *See* 18 U.S.C. § 2520 (Supp. 1993) (authorizing damages, equitable relief and/or costs); *compare with Sea Clammers*, 453 U.S. at 15, 23 (after reviewing the elaborate enforcement provisions found in the

Federal Water Pollution Control act, court concluded Congress could not have intended for litigants to bypass this comprehensive enforcement scheme by bringing suit directly under section 1983).

The court also rejects the City's attempt to reclassify plaintiffs' section 1983 claim as one arising out of a Fourteenth Amendment violation rather than a Fourth Amendment violation. In their complaint, plaintiffs allege the Fourth and Fourteenth Amendments guarantee plaintiffs the right to be free of unreasonable searches and seizures. Because the Fourth Amendment speaks of searches and seizures, the court understands plaintiffs to be alleging a Fourth Amendment violation and mentioning the Fourteenth Amendment only as the conduit through which the Fourth Amendment applies to the statutes. *See Mapp v. Ohio*, 367 U.S. 643 (1961).[9]

C. Count 5

In Count 5, plaintiffs allege the City's warrantless interception of their telephone communications constitutes a violation of plaintiffs' rights under Article I, section 6 of the Illinois Constitution.[10] The City argues plaintiffs may not bring a direct action based on Article I, section 6.

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9. The City boldly asserts the Fourth Amendment is inapplicable in the instant case without citing to any authority. Because the City raises this argument for the first time in its reply brief, the court declines to address it.

10. Article I, section 6 states, in part: "The people shall have the right to be secure in their persons, houses, papers and other (Cont'd)

Appendix E

When addressing a state law claim, a federal district court in Illinois is bound to follow Illinois Supreme Court interpretations. *Shields Enter, Inc. v. First Chicago Corp.*, 975 F.2d 1290, 1297 (7th Cir. 1992). And, absent authoritative statements from the Illinois Supreme Court, the district court is bound to follow Illinois Appellate Court interpretations of state law absent a good reason to think the Illinois Supreme Court would reject the appellate court's decision. *Shields*, 975 F.2d at 1297.

The court finds no Illinois case directly addressing the issue of whether a person can maintain a direct cause of action for improper eavesdropping under Article I, section 6 of the Illinois Constitution. While the parties both refer to *Newell v. City of Elgin*, 34 Ill. App. 3d 719, 340 N.E.2d 344 (2d Dist. 1976), that case did not reach the issue. In *Newell*, the plaintiff filed a multi-count complaint, one count (Count 3) of which was based on an illegal search under *both* Article I, section 6 and the Fourth Amendment to the United States Constitution. *Newell*, 34 Ill. App. 3d at __, 340 N.E.2d at 346-47.

Even though the court held that Count 3 stated a cause of action, it never expressly discussed the appropriateness of maintaining that count under Article I, section 6. Rather, the court discussed the efficacy of Count 3 in terms of the Fourth Amendment and *Bivens v. Six Unknown Federal*

(Cont'd)

possessions against unreasonable searches, seizures, invasions of privacy or interceptions of communications by eavesdropping devices or other means." S.H.A. Const. Art. I, § 6.

Narcotics Agents, 403 U.S. 388 (1971). (*Newell*, 34 Ill. App. 3d at __, 340 N.E.2d at 348-49.) *Newell* simply does not stand for the proposition that there is a direct cause of action available under Article I, section 6 of the Illinois Constitution.

Nevertheless, the court finds significant guidance on the issue in the Illinois Constitution, the official commentary thereto and Illinois case law. As noted above, Article I, section 6 provides a right to be free from "interceptions of communication by eavesdropping devices." The commentary to Article I, section 6 states that "[s]ection 12 supplements Section 6 by providing that every person shall find a remedy for all injuries and wrongs which he receives to his 'privacy.' " Article I, section 12 provides that "[e]very person shall find a certain remedy in the laws for all injuries and wrongs which he receives to his * * * privacy." The commentary to section 12 states, in pertinent part, that section 12 "adds, for the first time, the assurance that a person who receives an injury or a wrong for 'invasion of privacy' shall have a remedy. More importantly, the commentary refers to Ill. Rev. Stat. ch. 38, § 14-6 (1969) as already providing a criminal[11] remedy for *invasion of privacy by eavesdropping* as defined in that statute. (emphasis added.) The importance of this part of the commentary is that eavesdropping is considered a type of privacy invasion, and, thus, persons are

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11. Although the commentary uses the term "criminal," section 14-6 of the Illinois Criminal Code provided civil remedies for eavesdropping violations. Thus, the court will consider the word "criminal" to be a typographical error and that the commentators actually intended to use the term "civil."

entitled to a remedy under the remedial scheme of Article I, sections 6 and 12.

That does not completely answer the question of whether a party can bring a direct cause of action for improper eavesdropping under Article I, section 6, however. Illinois courts have interpreted section 12 of Article I to set forth a clear mandate to the courts that "whenever the legislature has failed to provide a remedy, the judiciary must do so." *See, e.g., Yount v. Hesston Corp.*, 124 Ill. App. 3d 943, __, 464 N.E.2d 1214, 1218 (2d Dist. 1984). As to improper eavesdropping, the Illinois General Assembly has provided a legislative remedy applicable to this case. Specifically, section 14-6 of the Criminal Code of 1961 provides a comprehensive civil damage scheme including actual and punitive damages, for "[a]ny or all parties to any conversation upon which eavesdropping is practiced contrary to this Article." 720 ILCS § 5/14-6 (1993). Additionally, the statute proscribes use of an eavesdropping device to hear or record all or part of any conversation or use or disclosure of any information obtained through eavesdropping. 720 ILCS § 5/14-2 (1993). Thus, under the foregoing statutory scheme, plaintiffs are entitled to maintain an action for civil damages based on the alleged conduct at issue in this case.[12] Because plaintiffs have a potential remedy sufficient to compensate them for any proved wrongs arising out of the alleged

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12. The court recognizes that there may be other forms of "eavesdropping" involving purely electronic communications for example which may not be addressed by the Illinois eavesdropping statute. The court does not decide whether a party may bring an action directly under Article I, section 6 for that or similar types of eavesdropping.

eavesdropping, the court believes that an Illinois court considering the issue in light of the facts of this case would not recognize a right to bring a separate action under Article I, section 6 of the Illinois Constitution.[13]

Finally, the court finds plaintiffs' reliance on *Rodgers v. St. Mary's Hospital of Decatur*, 149 Ill. 2d 302, 597 N.E.2d 616 (1992) misplaced. The *Rodgers* court addressed the issue of whether a particular statute granted the plaintiff a private cause of action by implication. *Rodgers*, 149 Ill. 2d at __, 597 N.E.2d at 619. The *Rodgers* case is sufficiently distinguishable to have no applicability to the issue before this court. Count 5 is accordingly dismissed.

II. Pitzman's Motion to Dismiss

A. Count 11 — "Intercept"

Pitzman argues, except as to plaintiffs Amati and Hillstrom, that plaintiffs' complaint contains no allegations that the communications purportedly taped were ever heard by anyone other than the intended participants. Absent such an allegation, Pitzman contends, there was no "interception" within the meaning of the Crime Control Act.

The Crime Control Act defines "intercept" to mean "the aural or other acquisition of the contents of any wire, electronic, mechanical, or other device [.]" 18 U.S.C.

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13. Of course, plaintiffs have brought numerous counts under the Illinois Eavesdropping Act. Thus, there rights to a remedy under the Illinois Constitution will be adequately protected in this case.

§ 2510(4) (Supp. 1993); *United States v. Shriver*, 989 F.2d 898, 902 (7th Cir. 1992). In *United States v. Turk*, 526 F.2d 654, 657-58 (5th Cir.), *cert. denied*, 429 U.S. 823 (1976), the Fifth Circuit addressed whether a recorded communication constitutes an interception within the meaning of the statute or whether the police officers subsequent replaying of the cassette tape constituted an "interception." The Fifth Circuit had no problem concluding a drug dealer's action in recording his conversation of a cohort was an "interception." *Turk*, 526 F.2d at 657.

The Fifth Circuit believed the word "acquisition" suggests the central concern of the statute is the activity engaged in at the time of the communication which causes the communication to be overheard by uninvited listeners. *Turk*, 526 F.2d at 658. The court states,

> If a person secrets a recorder in a room and thereby records a conversation between two others, an 'acquisition' occurs at the time the recording is made . . . Alternatively, a court facing the issue might conclude that an 'aural acquisition' is accomplished only when two steps are completed — the initial acquisition by the device and the hearing of the communication by the person or persons responsible for the recording. Either of these definitions would require participation by the one charged with an 'interception' in the contemporaneous acquisition of the communication through the use of the device.

Turk, 526 F.2d at 658; *Steve Jackson Games, Inc. v. United States Secret Service*, 816 F. Supp. 432, 441-42 (W.D.

Tex. 1993). The Fifth Circuit declined to adopt either interpretation, merely noting the differing interpretations presented "a nice question." *Turk*, 526 F.2d at 658 n.3.[14] After reviewing *Turk*, the Eleventh Circuit held in *United States v. Nelson*, 837 F.2d 1519, 1527 (11th Cir.), *cert. denied in Waldhart v. United States*, 488 U.S. 829 (1988), the term "intercept" as it relates to "aural acquisition" refers to the place where a communication is initially obtained regardless of where the communication is ultimately heard.

This court agrees with the Eleventh Circuit that the term "intercept" as it relates to an "acquisition" refers to the place where a communication is initially obtained. Whether the communication is heard by the human ear is irrelevant. As the Fifth Circuit noted in *Turk*, if a tree falls in a forest with no living listeners, there's still a sound if an active tape recorder is present; the sound is aurally acquired at the instant the action causing it occurred. *Turk*, 526 F.2d at 658. Pitzman argues this court should endorse the view that an interception requires two steps, acquisition and hearing. The Crime Control Act was enacted, Pitzman argues, to protect the individual's privacy. This privacy is not affected until the

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14. "While the Fifth Circuit authority relates to the predecessor statute, Congress intended no change in the existing definition of 'intercept' in amending the statute in 1986." *Steve Jackson Games*, 816 F. Supp at 432. "The definition of 'intercept' under current law is retained with respect to wire and oral communications except that the term 'or other' is inserted after 'aural. This amendment clarifies that it is illegal to intercept the non-voice portion of a wire communication.' " *Steve Jackson Games*, 816 F. Supp. at 442 (quoting S.R. No. 541, 99th Cong., 2nd Sess. 13 (1986), *reprinted in* 1986 U.S.C.A.A.N. 3555, 3567).

individual's communication is heard by an unintended party. The court disagrees. If a wiretap is placed on an individual's telephone and the conversation is recorded yet never listened to, the individual's conversations would be chilled if he knew of the wiretap. This would be so even if the individual was assured *no one* would listen to his conversations, because the individual's privacy interests are no longer autonomous. Rather, his privacy interests are subject to another's power. Thus, the policy interests behind the Federal Wiretapping Act are best served by the court's interpretation of "intercept."[15]

B. Count 13

Pitzman argues plaintiffs' complaint fails to specify whether he is being sued in his individual or official capacity. Absent such a specification, Pitzman argues, the court should construe Count 13 as a claim against Pitzman in his official capacity. As such, the count is redundant and should be dismissed. The court disagrees. In the heading of the complaint, plaintiffs list Pitzman as being sued individually and as chief of police of the City. This is sufficient to place Pitzman on notice that he is being sued in his individual capacity, as well as his official capacity.[16]

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15. The court declines to endorse Pitzman's reliance on *Smith v. Wunker*, 356 F. Supp. 44 (S.D. Ohio 1972), which was later overruled in *Boddie v. American Broadcasting Co.*, 731 F.2d 333, 338 (6th Cir. 1984) ("[*Smith*] was wrongly decided").

16. Pitzman's remaining arguments regarding Count 13 were addressed in the City's motion to dismiss, and the same analysis is applicable here.

C. Pitzman's Immunity in Counts 15, 17 and 19[17]

In Count 15, plaintiffs set forth a direct cause of action based on Article I, section 6 of the Illinois Constitution against Pitzman. In Count 17, plaintiffs allege Pitzman committed the tort of intrusion upon the seclusion of another, and in Count 19 plaintiffs allege Pitzman violated the Illinois Eavesdropping Act. Pitzman argues he is immune from damage liability by virtue of the Illinois Tort Immunity Act, 745 ILCS 10/2-201 (1993),[18] and by common law public officials' immunity.

However, plaintiffs argue questions of fact exist regarding the application of the Illinois Tort Immunity Act, and this court agrees. For example, despite Pitzman's contention to the contrary, immunity does not extend to: (1) public employee's acts based on corrupt or malicious motives, or (2) public employee's wilful and wanton acts. *Munizza v. City of Chicago*, 222 Ill. App. 3d 50, 583 N.E.2d 561 (1st Dist. 1991). Wilful and wanton conduct involves

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17. Pitzman's argument regarding a direct cause of action based on Article I, § 6 of the Illinois Constitution has been addressed in the City's motion to dismiss and the analysis set forth there applies to Pitzman also. Therefore, Count 15 is dismissed as to Pitzman as well.

18. The Illinois Tort Immunity Act provides in relevant part, "Except as otherwise provided by statute, a public employee serving in a position involving the determination of policy or the exercise of discretion is not liable for an injury resulting from his act or omission in determining policy when acting in the exercise of such discretion even though abused." 745 ILCS 10/2-201 (1993).

an element of intent or recklessness. *Anderson v. Village of Forest Park*, 238 Ill. App. 3d 83, __, 606 N.E.2d 205, 213 (1st Dist. 1992). Whether Pitzman acted intentionally in allegedly impermissibly placing a wiretap on the police department's private line is a question that cannot be answered based solely on the allegations in the complaint.[19] Dismissing a portion of the complaint on that basis would therefore be improper. The court will not address plaintiffs' argument that the purchase of insurance constitutes a waiver of governmental immunity, as that fact is not properly before the court.

D. Count 17

In Count 17, plaintiffs allege Pitzman violated their right to privacy and committed the tort of intrusion upon their seclusion. Pitzman argues the Illinois Supreme Court has not recognized the common law tort of intrusion upon seclusion. Alternatively, Pitzman argues that even if the Illinois Supreme Court has recognized such a tort, plaintiffs failed to state a claim based on the tort.

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19. The court is unpersuaded by Pitzman's reliance on *Gavery v. County of Lake*, 160 Ill. App. 3d 761, 513 N.E.2d 1127 (2d Dist. 1987), *appeal denied*, 118 Ill. 2d 542 (1988). The court is unable to determine the applicability of section 2-201, 745 ILCS 10/2-201 (1993), because the court has no evidence properly before it of Pitzman's duties and is unable to determine whether he was acting in a discretionary function when he allegedly taped the telephone line. Even if he was acting in a discretionary capacity, Pitzman lost any governmental immunity accorded by section 2-201 if it is proven he intentionally misused his powers of office. *See, e.g., Idlehour Dev. Co. and SSPF, Inc. v. City of St. Charles*, 88 Ill. App. 3d 47, 409 N.E.2d 544 (2d Dist. 1980).

Appendix E

In arguing that the Illinois Supreme Court would not recognize the tort of intrusion upon seclusion, Pitzman urges this court to overrule its earlier decision in *Garrison v. Burke*, No. 91 C 20150, 1993 WL 29909 (N.D. Ill. Feb. 8, 1993). In *Garrison*, after reviewing Illinois law, this court concluded that if faced with the issue today, the Illinois Supreme Court would recognize the tort of intrusion upon seclusion. The court is unpersuaded by Pitzman's arguments regarding *Garrison*, and the court adheres to its previous conclusion.[20]

Pitzman argues plaintiffs have not alleged the tort because they have failed to demonstrate whether anyone overheard their communications (with the exception of the Amati/Hillstrom conversation). In *Lovgren v. Citizens First Nat'l Bank*, 126 Ill. 2d 411, __, 534 N.E.2d 987, 988 (1989), the Illinois Supreme Court set forth the tort of intrusion upon the seclusion of another:

> 'One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his

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20. In *Thomas v. Pearl*, No. 92-2709, slip op. at 8 (7th Cir. July 1, 1993), the Seventh Circuit suggested that such a tort exists in Illinois, citing *Lovgren v. Citizens First Nat'l Bank*, 126 Ill. 2d 411, 534 N.E.2d 987 (1989). The Seventh Circuit further noted that such an invasion of privacy might include eavesdropping by wiretapping, again citing *Lovgren*. *Thomas*, No. 92-2709, slip op. at 9 (7th Cir. July 1, 1993). *Lovgren* itself expressly states that it is not deciding whether such a tort exists in Illinois notwithstanding its discussion of the tort as enunciated by other authorities. *Lovgren*, 126 Ill. 2d at __, 534 N.E.2d at 989.

> privacy, if the intrusion would be highly offensive to a reasonable person.'

Lovgren, 126 Ill. 2d at __, 534 N.E.2d at 988 (quoting Restatement (Second) of Torts § 652B, at 378 (1977)). The *Lovgren* court noted the nature of the tort depends on some type of highly offensive *prying* into the physical boundaries or affairs of another and its basis is not publication or publicity. *Lovgren*, 126 Ill. 2d at __, 534 N.E.2d at 989. The court also noted Prosser and Keaton's treatise on torts cites eavesdropping by wiretapping as an example of the tort. *Lovgren*, 126 Ill. 2d at __, 534 N.E.2d at 989; *see also Thomas v. Pearl*, No. 92-2709, slip op. at 9 (7th Cir. July 1, 1993).

While the issue of whether a surreptitiously recorded conversation on a tapped telephone line must actually be overheard to constitute the tort of intrusion into seclusion is an undecided one in Illinois, the court believes that there are several reasons why the Illinois courts would not so limit the cause of action. First, the Illinois Supreme Court has already cited with approval the Restatement (Second) of Torts § 652 B (1977) and comments thereto in discussing the elements necessary to prove the tort of intrusion into seclusion. *See Lovgren*, 126 Ill. 2d at __, 534 N.E.2d at 988-89. The illustrations that follow section 652B state that when "A taps B's telephone wires and installs a recording device to make a record of B's conversations[,] A has invaded B's privacy." Restatement (Second) of Torts § 652 B, 379, illustration 3 (1977). Under illustration 3, mere recordation is sufficient. None of the comments or illustrations contained in section 652 B suggest that the tort requires that someone actually hear or listen to the recorded information.

Second, several cases from other jurisdictions also support such a conclusion. In *Hamberger v. Eastman*, 106 N.H. 107, 206 A.2d 239 (1964), the court held that the tort of intrusion upon seclusion does not require that anyone listen or hear the recordation. More importantly, the court emphasized that a sound recordation obtained by eavesdropping carries with it a *potential* projection of a private conversation and that such potential disclosure impairs the mental peace and comfort associated with an individual's expectation of privacy. *Hamberger*, 106 N.H. at 112, 206 A.2d at 239. Similarly, the Supreme Court of Pennsylvania, while concluding that a plaintiff had not stated a cause of action for the tort where the recording had not been listened to and had been destroyed, noted that had the evidence shown that there was "some *potential*" that the recording would be heard in the future then the tort would be established. (emphasis added). *Marks v. Bell Tel. Co.*, 460 PA. 73, 87, 331 A.2d 424, 431 (1975). Additionally, one justice of the Pennsylvania Supreme Court considered the *Hamberger* case to be correct in its holding that "one's seclusion may be as much disrupted by the presence of an electronic ear in a setting where one would normally expect to be alone as it is by the presence of a human ear in that same place." *Marks*, 460 PA. at 90, 331 A.2d at 433 (Pomeroy, J. concurring). It is this court's opinion that the *Hamberger* case is most consistent with section 652 B of the Restatement and as such would be persuasive to the Illinois courts considering the issue.[21]

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21. The court makes special note of a district court opinion from within the Seventh Circuit that concludes that the tort requires (Cont'd)

Appendix E

Lastly, from a purely logical point of view, the secret use of a mechanical listening and recording device to capture private conversations seems to run afoul of the interests sought to be protected by the tort of intrusion upon seclusion. It is an intentional interference with another's solitude or seclusion. Prosser and Keaton on Torts, § 117 at 854 (1984); Restatement (Second) of Torts § 652 B, comment a (1977). The placing of a recording device in an area where one has a reasonable expectation of privacy is both intrusive and disruptive. In plain language, it ruins the privacy. One would never obtain the full benefits accorded to a private place if he or she reasonably believed someone would or could be listening.[22] The court is of the opinion that if Illinois courts

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(Cont'd)

someone to actually overhear a conversation. *See Moffett v. Gene B. Glick Co.*, 621 F. Supp. 244, 284 (N.D. Ind. 1985). The *Moffett* case is not particularly persuasive on this point, however, because it dealt with the surreptitious use of an interoffice intercom where no recording was apparently involved. Thus, there was no potential for future hearing of a recorded conversation. Furthermore, *Moffett* relies on *Vernars v. Young*, 539 F.2d 966, 969 (5th Cir. 1976), a case that is distinguishable because it concerned the opening and reading of private mail, and *Marks v. Bell Tel. Co.*, 460 PA. 73, 331 A.2d 424 (1975), a case which this court has already pointed out recognizes that the tort could be maintained where a recording provides the potential for the conversation to be overheard in the future. *Moffett*, 621 F. Supp. at 284. Accordingly, this court's determination of the likely conclusion Illinois courts will reach on this issue is unaffected by the *Moffett* opinion.

22. One need only conjure up slightly different factual circumstances to more clearly appreciate this type of privacy

(Cont'd)

were to adopt this tort, they would also recognize a cause of action as pled in this case. Accordingly, the lack of allegations that anyone actually listened to the recorded telephone conversations do not defeat plaintiffs' claims.

III. Beu's Motion to Dismiss

Most of the arguments made by Beu have been previously addressed by the court herein with regard to the City's and Pitzman's motion to dismiss, and the analysis applies to Beu with equal force. Regarding Count 25, the court agrees with Beu that plaintiffs' complaint fails to disclose whether they are suing him in his individual or official capacity. Where a party files a section 1983 claim against a public official allegedly acting under color of state law, a court will assume he has been sued in his official capacity. *Kolar v. County of Sangamon*, 756 F.2d 564, 568 (7th Cir. 1985). "If a plaintiff intends to sue public officials in their individual capacities or in both their official and individual capacities he should expressly state so in the complaint." *Kolar*, 756 F.2d at 568; *see also Yeksigian v. Nappi*, 900 F.2d 101, 104, (7th Cir. 1990). Plaintiffs argue they have satisfied the federal rules' liberal pleading standard, and cite to *Leatherman v. Tarrant County Narcotics*

(Cont'd)

invasion. For example, if one knew that someone had secretly placed a video camera in his or her marital bedroom the consequences to the sanctity of that area would be too apparent to require discussion. Such would be the case whether a video tape was actually made or viewed. It is not the information that one obtains from such an intrusion that is necessarily tortious, but rather, the fact someone has accessed an area reasonably expected to be private.

Intelligence and Coordination Unit, __ U.S. __, 113 S. Ct. __ (1993). The court believes *Leatherman* does not change the position taken by the Seventh Circuit. When a plaintiff is silent regarding whether he is suing a public official in his official or individual capacity, he has not satisfied Fed. R. Civ. P. 8, nor does *Leatherman* prevent a court from construing the plaintiff's silence as a complaint against the official in his or her official capacity.

Moreover, Beu is correct in noting that a section 1983 claim against a public official in his or her official capacity is redundant and unnecessary when the complaint also includes a section 1983 claim against the municipality. *See Busby v. City of Orlando*, 931 F.2d 764, 776 (11th Cir. 1991); *Kohn v. Mucia*, 776 F. Supp. 348, 356 (N.D. Ill. 1991). Therefore, Count 25 is dismissed. Leave is given to amend the complaint within 14 days to include a section 1983 claim against Beu in his individual capacity if plaintiffs so desire.

CONCLUSION

For the reasons stated above, defendants' motion to dismiss is granted in part and denied in part. Counts 1, 5, 15 and 25 are dismissed. Leave is given to amend the complaint as to Count 25 within 14 days to state a section 1983 claim against Beu in his individual capacity.

ENTER:

s/ Philip G. Reinhard
PHILIP G. REINHARD, JUDGE
UNITED STATES DISTRICT COURT

DATED: August 10, 1993

APPENDIX F — RELEVANT STATUTES

18 U.S.C.A. § 2510

§ 2510. Definitions

As used in this chapter —

(1) "wire communication" means any aural transfer made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception (including the use of such connection in a switching station) furnished or operated by any person engaged in providing or operating such facilities for the transmission of interstate or foreign communications or communications affecting interstate or foreign commerce and such term includes any electronic storage of such communication;

(2) "oral communication" means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation, but such term does not include any electronic communication;

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States;

(4) "intercept" means the aural or other acquisition of the contents of any wire, electronic,

or oral communication through the use of any electronic, mechanical, or other device;

(5) "electronic, mechanical, or other device" means any device or apparatus which can be used to intercept a wire, oral, or electronic communication other than —

> (a) any telephone or telegraph instrument, equipment or facility, or any component thereof, (i) furnished to the subscriber or user by a provider of wire or electronic communication service in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business or furnished by such subscriber or user for connection to the facilities of such service and used in the ordinary course of its business; or (ii) being used by a provider of wire or electronic communication service in the ordinary course of its business, or by an investigative or law enforcement officer in the ordinary course of his duties;
>
> (b) a hearing aid or similar device being used to correct subnormal hearing to not better than normal;

(6) "person" means any employee, or agent of the United States or any State or political subdivision thereof, and any individual, partnership, association, joint stock company, trust, or corporation;

(7) "Investigative or law enforcement officer" means any officer of the United States or of a State or political subdivision thereof, who is empowered by law to conduct investigations of or to make arrests for offenses enumerated in this chapter, and any attorney authorized by law to prosecute or participate in the prosecution of such offenses;

(8) "contents", when used with respect to any wire, oral, or electronic communication, includes any information concerning the substance, purport, or meaning of that communication;

(9) "Judge of competent jurisdiction" means —

(a) a judge of a United States district court or a United States court of appeals; and

(b) a judge of any court of general criminal jurisdiction of a State who is authorized by a statute of that State to enter orders authorizing interceptions of wire, oral, or electronic communications;

(10) "communication common carrier" shall have the same meaning which is given the term "common carrier" by section 153(h) of title 47 of the United States Code;

(11) "aggrieved person" means a person who was a party to any intercepted wire, oral, or

electronic communication or a person against whom the interception was directed;

(12) "electronic communication" means any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system that affects interstate or foreign commerce, but does not include —

(A) any wire or oral communication;

(B) any communication made through a tone-only paging device;

(C) any communication from a tracking device (as defined in section 3117 of this title); or

(D) electronic funds transfer information stored by a financial institution in a communications system used for the electronic storage and transfer of funds;

(13) "user" means any person or entity who —

(A) uses an electronic communication service; and

(B) is duly authorized by the provider of such service to engage in such use;

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(14) "electronic communications system" means any wire, radio, electromagnetic, photooptical or photoelectronic facilities for the transmission of electronic communications, and any computer facilities or related electronic equipment for the electronic storage of such communications;

(15) "electronic communication service" means any service which provides to users thereof the ability to send or receive wire or electronic communications;

(16) "readily accessible to the general public" means, with respect to a radio communication, that such communication is not —

(A) scrambled or encrypted:

(B) transmitted using modulation techniques whose essential parameters have been withheld from the public with the intention of preserving the privacy of such communication;

(C) carried on a subcarrier or other signal subsidiary to a radio transmission;

(D) transmitted over a communication system provided by a common carrier, unless the communication is a tone only paging system communication; or

(E) transmitted on frequencies allocated under part 25, subpart D, E, or F of part 74, or part 94 of the Rules of the Federal Communications Commission, unless, in the case of a communication transmitted on a frequency allocated under part 74 that is not exclusively allocated to broadcast auxiliary services, the communication is a two-way voice communication by radio;

[(F) Repealed. Pub.L. 104-132, Title VII, § 731(2)(C), Apr. 24, 1996, 110 Stat. 1303]

(17) "electronic storage" means —

(A) any temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof; and

(B) any storage of such communication by an electronic communication service for purposes of backup protection of such communication; and

(18) "aural transfer" means a transfer containing the human voice at any point between and including the point of origin and the point of reception.

* * *

Appendix F

18 U.S.C.A. § 2511

§ 2511. Interception and disclosure of wire, oral, or electronic communications prohibited

(1) Except as otherwise specifically provided in this chapter any person who —

(a) intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication;

(b) intentionally uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when —

(i) such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication; or

(ii) such device transmits communications by radio, or interferes with the transmission of such communication; or

(iii) such person knows, or has reason to know, that such device or any component thereof has been sent through the mail or transported in interstate or foreign commerce; or

(iv) such use or endeavor to use (A) takes place on the premises of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or (B) obtains or is for the purpose of obtaining information relating to the operations of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or

(v) such person acts in the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States;

(c) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection;

(d) intentionally uses, or endeavors to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection; or

(e) (i) intentionally discloses, or endeavors to disclose, to any other person the contents of any

> wire, oral, or electronic communication, intercepted by means authorized by sections 2511(2)(a)(ii), 2511(2)(b) to (c), 2511(2)(e), 2516, and 2518 of this chapter, (ii) knowing or having reason to know that the information was obtained through the interception of such a communication in connection with a criminal investigation, (iii) having obtained or received the information in connection with a criminal investigation, and (iv) with intent to improperly obstruct, impede, or interfere with a duly authorized criminal investigation,

shall be punished as provided in subsection (4) or shall be subject to suit as provided in subsection (5).

(2)(a)(i) It shall not be unlawful under this chapter for an operator of a switchboard, or on officer, employee, or agent of a provider of wire or electronic communication service, whose facilities are used in the transmission of a wire or electronic communication, to intercept, disclose, or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of his service or to the protection of the rights or property of the provider of that service, except that a provider of wire communication service to the public shall not utilize service observing or random monitoring except for mechanical or service quality control checks.

(ii) Notwithstanding any other law, providers of wire or electronic communication service, their officers, employees, and agents, landlords, custodians, or other

persons, are authorized to provide information, facilities, or technical assistance to persons authorized by law to intercept wire, oral, or electronic communications or to conduct electronic surveillance, as defined in section 101 of the Foreign Intelligence Surveillance Act of 1978, if such provider, its officers, employees, or agents, landlord, custodian, or other specified person, has been provided with —

> (A) a court order directing such assistance signed by the authorizing judge, or
>
> (B) a certification in writing by a person specified in section 2518(7) of this title or the Attorney General of the United States that no warrant or court order is required by law, that all statutory requirements have been met, and that the specified assistance is required,

setting forth the period of time during which the provision of the information, facilities, or technical assistance is authorized and specifying the information, facilities, or technical assistance required. No provider of wire or electronic communication service, officer, employee, or agent thereof, or landlord, custodian, or other specified person shall disclose the existence of any interception or surveillance or the device used to accomplish the interception or surveillance with respect to which the person has been furnished a court order or certification under this chapter, except as may otherwise be required by legal process and then only after prior notification to the Attorney General or to the principal prosecuting attorney of a State or any political

subdivision of a State, as may be appropriate. Any such disclosure, shall render such person liable for the civil damages provided for in section 2520. No cause of action shall lie in any court against any provider of wire or electronic communication service, its officers, employees, or agents, landlord, custodian, or other specified person for providing information, facilities, or assistance in accordance with the terms of a court order or certification under this chapter.

(b) It shall not be unlawful under this chapter for an officer, employee, or agent of the Federal Communications Commission, in the normal course of his employment and in discharge of the monitoring responsibilities exercised by the Commission in the enforcement of chapter 5 of title 47 of the United States Code, to intercept a wire or electronic communication, or oral communication transmitted by radio, or to disclose or use the information thereby obtained.

(c) It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire, oral, or electronic communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

(d) It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire, oral, or electronic communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State.

(e) Notwithstanding any other provision of this title or section 705 or 706 of the Communications Act of 1934, it shall not be unlawful for an officer, employee, or agent of the United States in the normal course of his official duty to conduct electronic surveillance, as defined in section 101 of the Foreign Intelligence Surveillance Act of 1978, as authorized by that Act.

(f) Nothing contained in this chapter or chapter 121, or section 705 of the Communications Act of 1934, shall be deemed to affect the acquisition by the United States Government of foreign intelligence information from international or foreign communications, or foreign intelligence activities conducted in accordance with otherwise applicable Federal law involving a foreign electronic communications system, utilizing a means other than electronic surveillance as defined in section 101 of the Foreign Intelligence Surveillance Act of 1978, and procedures in this chapter and the Foreign Intelligence Surveillance Act of 1978 shall be the exclusive means by which electronic surveillance, as defined in section 101 of such Act, and the interception of domestic wire and oral communications may be conducted.

(g) It shall not be unlawful under this chapter or chapter 121 of this title for any person —

> (i) to intercept or access an electronic communication made through an electronic communication system that is configured so that such electronic communication is readily accessible to the general public;

(ii) to intercept any radio communication which is transmitted —

(I) by any station for the use of the general public, or that relates to ships, aircraft, vehicles, or persons in distress;

(II) by any governmental, law enforcement, civil defense, private land mobile, or public safety communications system, including police and fire, readily accessible to the general public;

(III) by a station operating on an authorized frequency within the bands allocated to the amateur, citizens band, or general mobile radio services; or

(IV) by any marine or aeronautical communications system;

(iii) to engage in any conduct which —

(I) is prohibited by section 633 of the Communications Act of 1934; or

(II) is excepted from the application of section 705(a) of the Communications Act of 1934 by section 705(b) of that Act;

(iv) to intercept any wire or electronic or electronic communication the transmission of

which is causing harmful interference to any lawfully operating station or consumer electronic equipment, to the extent necessary to identify the source of such interference; or

(v) for other users of the same frequency to intercept any radio communication made through a system that utilizes frequencies monitored by individuals engaged in the provision or the use of such system, if such communication is not scrambled or encrypted.

(h) It shall not be unlawful under this chapter —

(i) to use a pen register or a trap and trace device (as those terms are defined for the purposes of chapter 206 (relating to pen registers and trap and trace devices) of this title); or

(ii) for a provider of electronic communication service to record the fact that a wire or electronic communication was initiated or completed in order to protect such provider, another provider furnishing service toward the completion of the wire or electronic communication, or a user of that service, from fraudulent, unlawful or abusive use of such service.

(3)(a) Except as provided in paragraph (b) of this subsection, a person or entity providing an electronic communication service to the public shall not intentionally divulge the contents of any communication (other than one

to such person or entity, or an agent thereof) while in transmission on that service to any person or entity other than an addressee or intended recipient of such communication or an agent of such addressee or intended recipient.

(b) A person or entity providing electronic communication service to the public may divulge the contents of any such communication —

(i) as otherwise authorized in section 2511(2)(a) or 2517 of this title;

(ii) with the lawful consent of the originator or any addressee or intended recipient of such communication;

(iii) to a person employed or authorized, or whose facilities are used, to forward such communication to its destination; or

(iv) which were inadvertently obtained by the service provider and which appear to pertain to the commission of a crime, if such divulgence is made to a law enforcement agency.

(4)(a) Except as provided in paragraph (b) of this subsection or in subsection (5), whoever violates subsection (1) of this section shall be fined under this title or imprisoned not more than five years, or both.

(b) If the offense is a first offense under paragraph (a) of this subsection and is not for a tortious or illegal purpose

or for purposes of direct or indirect commercial advantage or private commercial gain, and the wire or electronic communication with respect to which the offense under paragraph (a) is a radio communication that is not scrambled, encrypted, or transmitted using modulation techniques the essential parameters of which have been withheld from the public with the intention of preserving the privacy of such communication, then —

(i) if the communication is not the radio portion of a cellular telephone communication, a cordless telephone communication that is transmitted between the cordless telephone handset and the base unit, a public land mobile radio service communication or a paging service communication, and the conduct is not that described in subsection (5), the offender shall be fined under this title or imprisoned not more than one year, or both; and

(ii) if the communication is the radio portion of a cellular telephone communication, a cordless telephone communication that is transmitted between the cordless telephone handset and the base unit, a public land mobile radio service communication or a paging service communication, the offender shall be fined under this title.

(c) Conduct otherwise an offense under this subsection that consists of or relates to the interception of a satellite transmission that is not encrypted or scrambled and that is transmitted —

(i) to a broadcasting station for purposes of retransmission to the general public; or

(ii) as an audio subcarrier intended for redistribution to facilities open to the public, but not including data transmissions or telephone calls,

is not an offense under this subsection unless the conduct is for the purposes of direct or indirect commercial advantage or private financial gain.

(5)(a)(i) If the communication is —

(A) a private satellite video communication that is not scrambled or encrypted and the conduct in violation of this chapter is the private viewing of that communication and is not for a tortious or illegal purpose or for purposes of direct or indirect commercial advantage or private commercial gain; or

(B) a radio communication that is transmitted on frequencies allocated under subpart D of part 74 of the rules of the Federal Communications Commission that is not scrambled or encrypted and the conduct in violation of this chapter is not for a tortious or illegal purpose or for purposes of direct or indirect commercial advantage or private commercial gain,

then the person who engages in such conduct shall be subject to suit by the Federal Government in a court of competent jurisdiction.

(ii) In an action under this subsection —

(A) if the violation of this chapter is a first offense for the person under paragraph (a) of subsection (4) and such person has not been found liable in a civil action under section 2520 of this title, the Federal Government shall be entitled to appropriate injunctive relief; and

(B) if the violation of this chapter is a second or subsequent offense under paragraph (a) of subsection (4) or such person has been found liable in any prior civil action under section 2520, the person shall be subject to a mandatory $500 civil fine.

(b) The court may use any means within its authority to enforce an injunction issued under paragraph (ii)(A), and shall impose a civil fine of not less than $500 for each violation of such an injunction.

* * *

18 U.S.C.A. § 2520

§ 2520. Recovery of civil damages authorized

(a) In general. — Except as provided in section 2511(2)(a)(ii), any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter may in a civil action recover from the person or entity which engaged in that violation such relief as may be appropriate.

(b) Relief. — In an action under this section, appropriate relief includes —

(1) such preliminary and other equitable or declaratory relief as may be appropriate;

(2) damages under subsection (c) and punitive damages in appropriate cases; and

(3) a reasonable attorney's fee and other litigation costs reasonably incurred.

(c) Computation of damages. — (1) In an action under this section, if the conduct in violation of this chapter is the private viewing of a private satellite video communication that is not scrambled or encrypted or if the communication is a radio communication that is transmitted on frequencies allocated under subpart D of part 74 of the rules of the Federal Communications Commission that is not scrambled or encrypted and the conduct is not for a tortious or illegal purpose or for purposes of direct or indirect commercial advantage or private commercial gain, then the court shall assess damages as follows:

(A) If the person who engaged in that conduct has not previously been enjoined under section 2511(5) and has not been found liable in a prior civil action under this section, the court shall assess the greater of the sum of actual damages suffered by the plaintiff, or statutory damages of not less than $50 and not more than $500.

(B) If, on one prior occasion, the person who engaged in that conduct has been enjoined under section 2511(5) or has been found liable in a civil action under this section, the court shall assess the greater of the sum of actual damages suffered by the plaintiff, or statutory damages of not less than $100 and not more than $1000.

(2) In any other action under this section, the court may assess as damages whichever is the greater of —

(A) the sum of the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation; or

(B) statutory damages of whichever is the greater of $100 a day for each day of violation or $10,000.

(d) Defense. — A good faith reliance on —

(1) a court warrant or order, a grand jury subpoena, a legislative authorization, or a statutory authorization;

(2) a request of an investigative or law enforcement officer under section 2518(7) of this title; or

(3) a good faith determination that section 2511(3) of this title permitted the conduct complained of;

is a complete defense against any civil or criminal action brought under this chapter or any other law.

(e) Limitation. — A civil action under this section may not be commenced later than two years after the date upon which the claimant first has a reasonable opportunity to discover the violation.

* * *

18 U.S.C.A. § 2707

§ 2707. Civil action

(a) Cause of action. — Except as provided in section 2703(e), any provider of electronic communication service, subscriber, or other person aggrieved by any violation of this chapter in which the conduct constituting the violation is engaged in with a knowing or intentional state of mind may, in a civil action, recover from the person or entity which engaged in that violation such relief as may be appropriate.

(b) Relief. — In a civil action under this section, appropriate relief includes —

(1) such preliminary and other equitable or declaratory relief as may be appropriate;

(2) damages under subsection (c); and

(3) a reasonable attorney's fee and other litigation costs reasonably incurred.

(c) Damages. — The court may assess as damages in a civil action under this section the sum of the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation, but in no case shall a person entitled to recover receive less than the sum of $1,000. If the violation is willful or intentional, the court may assess punitive damages. In the case of a successful action to enforce liability under this section, the court may assess the costs of the action, together with reasonable attorney fees determined by the court.

(d) Disciplinary actions for violations. — If a court determines that any agency or department of the United States has violated this chapter and the court finds that the circumstances surrounding the violation raise the question whether or not an officer or employee of the agency or department acted willfully or intentionally with respect to the violation, the agency or department concerned shall promptly initiate a proceeding to determine whether or not disciplinary action is warranted against the officer or employee.

(e) Defense. — A good faith reliance on —

(1) a court warrant or order, a grand jury subpoena, a legislative authorization, or a statutory authorization;

(2) a request of an investigative or law enforcement officer under section 2518(7) of this title; or

(3) a good faith determination that section 2511(3) of this title permitted the conduct complained of;

is a complete defense to any civil or criminal action brought under this chapter or any other law.

(f) Limitation. — A civil action under this section may not be commenced later than two years after the date upon which the claimant first discovered or had a reasonable opportunity to discover the violation.

* * * *

Supreme Court, U.S.
OCT 4 1999
OFFICE OF THE CLERK

No. 99-216

IN THE

Supreme Court of the United States

CHARLES AMATI, *et al.*,

Petitioners,

v.

CITY OF WOODSTOCK, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Petitioners contended in the trial court that respondents, the City of Woodstock ("Woodstock"), its police chief, administrative sergeant, and communications supervisor, violated § 2511(1)(a) of the Federal Wiretap Act (the "Wiretap Act") by taping (815) 338-7799, a telephone line in the Woodstock Police Department.[1] (Section 2511(1)(a) of the Act prohibits the intentional interception of a wire communication.) Petitioners argued to the jury that the taping was done secretly so that respondents could obtain private information about petitioners from their personal calls, in order to gain an advantage in on-going union collective bargaining negotiations, to discover infractions of department rules, and to monitor criticism by petitioners of the department administration. Respondents denied petitioners' contentions. Respondents maintained that the 7799 line was routinely taped, like 911 and other police lines in the department, for legitimate police purposes. Respondents maintained that the taping of the line fell within 18 U.S.C. § 2510(5)(a), which excepts from the prohibitions of the Wiretap Act the taping of a telephone line by a "law enforcement officer in the ordinary course of his duties. . . ." 18 U.S.C. § 2510(5)(a). Prior to trial, the Wiretap Act claims were dismissed against Woodstock.

Prior to the case going to the jury, petitioners moved for judgment as a matter of law, which was denied by the trial court based on a conflict in the evidence. The jury was then

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1. Petitioners also alleged that the taping violated the Fourth Amendment and sought recovery for it under 42 U.S.C. § 1983. Those claims were also determined in favor of respondents by the jury. Petitioners did not appeal and those claims are not at issue here.

instructed that the taping had to be done "secretly" in order to violate the Wiretap Act. The jury was also given a special interrogatory asking whether it found that the taping was done secretly. After deliberation, the jury returned a verdict in favor of respondents, and answered the special interrogatory that the taping was not secret.

Petitioners then appealed to the Seventh Circuit arguing, inter alia, that the trial court should have granted their motion for a judgment as a matter of law, that the jury was improperly instructed, and that the district court erred in dismissing the Wiretap Act claim against Woodstock. The Seventh Circuit found that based on the conflict in the evidence presented at the trial, petitioners were not entitled to judgment as a matter of law. The Seventh Circuit also found that petitioners waived any objection to the jury instructions. The Seventh Circuit further observed in its opinion that the dismissal of Woodstock was proper because municipalities are not subject to § 2511(1) of the Wiretap Act.

The petition distorts the evidentiary record. The facts that the jury credited and which support the jury's verdict and the Seventh Circuit's affirmance are ignored.

A. The Petition Misrepresents The Nature Of The 7799 Line.

The petition describes 7799 as though it were a telephone line dedicated for petitioners' personal use. In actuality, 7799 was a police business line which had been taped in the department communication center since shortly after it was installed in 1978. Since its inception the 7799 line had been used to respond to bank alarms, and to communicate with police officers, rescue squad personnel and other law

enforcement agencies regarding police business. Taping of the line was expanded to all locations within the police station in February, 1992, chiefly as a response to the mishandling by a police dispatcher of a call regarding a chlorine gas leak at a public swimming pool. The investigation into how the call was handled was thwarted because several of the crucial calls regarding the incident were on 7799 at untaped locations.

The line was unpublished, but that too was for police business purposes. Petitioners' contention that 7799 was dedicated for their personal use was refuted by transcripts of recordings of calls on that line regarding a request for a rescue squad for a choking victim at a nearby courthouse, several reports of threats of domestic violence, calls regarding a drug overdose by a 15-year old boy, a report of a person having a heart attack, several calls about automobile accidents and disabled vehicles, a call to complain about discourteous service by a dispatcher, and many other emergency and non-emergency police service calls. The 7799 line was taped for the same reason that six other telephone lines in the department were taped — to have a record of calls relating to police business.

B. The Petition Misrepresents That Respondents Mislead Petitioners About The Nature Of 7799

Petitioners misrepresent that they were mislead into believing that the 7799 line was an untaped line for personal telephone calls. Petitioners dug up an out-dated memorandum circulated in the department in 1982, ten years before the expanded taping, which they argued established a policy that 7799 was untaped for personal calls. However, the memorandum never expressed an official policy of

Woodstock. On the contrary, it was circulated without authority by one of the petitioners who served temporarily as a technical assistant in the communications department. It was neither issued nor approved by the police chief. By 1992, when the taping of 7799 was expanded, the old memorandum was long forgotten, and only a handful of petitioners had ever seen it. The argument that this obsolete memorandum mislead petitioners about the nature of 7799 was, given the jury's verdict, completely discredited.

The same is true of the other memoranda which petitioners claim mislead them into believing 7799 to be an untaped line for personal calls. The petition states that a 1985 telecommunications manual designated 7799 as an untaped line, but fails to mention that in 1991, that manual was superceded by a new one that deleted any reference to 7799 as an untaped line. A 1986 memorandum that petitioners' relied on actually warned that 7799 was subject to being taped at all locations, and evidence was presented to show that another memorandum petitioners offered to show that 7799 was an untaped line for personal calls was actually fabricated.

The petition also misrepresents that petitioners were encouraged to make personal telephone calls on 7799. The evidence showed that personal calls were prohibited on 7799, and on all other police lines. Although the prohibition was widely disregarded, respondents made many efforts to prevent personal use of the 7799 lines in the department.

C. The Petition Misrepresents The Extent Of Petitioners' Knowledge Of The Expanded Taping.

The petition misrepresents that petitioners had no notice of the 1992 expansion of the taping of the 7799 line. The

evidence showed that several petitioners had actual knowledge of the taping, but feigned a lack of knowledge to share in a potential windfall they hoped to recover from the lawsuit. In addition, the evidence showed that all petitioners should have known of the expanded taping, from the equipment used to tape the line, from the prior history of the taping of the line, from discussions about the expanded taping in the department, and because it was a police line which, like other police lines in the department, was subject to being routinely taped. The jury clearly found respondents' evidence credible and rendered their verdict accordingly.

REASONS FOR DENYING THE WRIT

I. THE WRIT SHOULD BE DENIED ON THE QUESTION OF THE SEVENTH CIRCUIT'S APPLICATION OF THE ORDINARY COURSE EXCEPTION, BECAUSE THE PETITION IGNORES THE PROCEDURAL POSTURE IN WHICH THE CASE CAME TO THE COURT OF APPEALS, AND BECAUSE THE SEVENTH CIRCUIT PROPERLY INTERPRETED THE ORDINARY COURSE EXCEPTION.

A. Plaintiffs' Ignore The Procedural Posture of The Case Before The Court Of Appeals

The petition reads like a law school term paper on a legal issue disembodied from a real life trial setting. In reality, the case was appealed to the Seventh Circuit from a jury verdict finding no violation of the Wiretap Act, a verdict returned after three weeks of hotly contested evidence. Petitioners now argue that the Seventh Circuit should have reversed the jury's verdict and ordered judgment in

petitioners' favor as a matter of law, and the petition reads as though there were no side to this case but theirs.

Respondents introduced evidence to show that 7799 was always a police line, and that efforts were made over the years to prevent personal calls on the line. They showed that the line had always been taped in the communications center, that the taping was prominently posted in that part of the police station, and that when the taping of the line was expanded in 1992, it was done openly and was easily discoverable.

Respondents introduced evidence to show that petitioners were in fact misleading the jury by distorting the intent and meaning of the various memoranda issued by the department, and that petitioners' may have even fabricated one memorandum. Respondents proved that the expanded taping of 7799 was done in 1992 only because of the administrative need for the line to be taped, which became apparent when an investigation into whether a police dispatcher had mishandled a call was rendered inconclusive because crucial calls were made on 7799 at an untaped location. Respondents submitted evidence that the taping was done only for police purposes.

Faced with divergent evidence, the district court properly denied petitioners' motion for judgment as a matter of law. The case was submitted to the jury, which was instructed that one of the elements petitioners' must prove in order to prevail was that the taping was done "secretly." Petitioners made no objection to this instruction. In fact, petitioners included this same element in their own set of proposed instructions. After deliberation, the jury returned a verdict in favor of respondents, answering a special interrogatory that the taping was not done secretly.

Petitioners' argument on appeal was that they were entitled to judgment as a matter of law. However, the evidence presented in the trial court was so conflicting that there was no way in which the Seventh Circuit could have agreed that petitioners were entitled to judgment as a matter of law. The argument petitioners now make in their petition, regarding the proper meaning of the "ordinary course" exception, might have been appropriate to an argument in the Court of Appeals on the propriety of the jury instructions. However, petitioners could not complain about the instructions because they failed to object to them in the district court. The Seventh Circuit, finding that petitioners were properly denied judgment as a matter of law, and that any objection to the instructions was waived, affirmed the judgment.

The argument presented in the petition regarding the proper elements of the ordinary course exception under the Wiretap Act is disconnected from the results below. The Seventh Circuit's interpretation of the "ordinary course" exception was correct, but even if not correct, petitioners' real bone of contention is with how the jury was instructed, not with the Seventh Circuit's interpretation of the ordinary course exception. Because petitioners included the same "secretly" language in their instructions and did not object to this language, the jury instruction issue was waived. The argument contained in the petition, representing petitioners' view of the "ordinary course" exception, can have no impact on the outcome of the case. As a result, the Writ should be denied.

B. The Writ Should Be Denied Because The Seventh Circuit's Interpretation of The "Ordinary Course" Exception Was Correct, And Is Consistent, Rather Than In Conflict, With The View Of Other Circuits

Petitioners disagree with the Seventh Circuit's interpretation of the "ordinary course" exception to the Wiretap Act's prohibitions. They argue that the exception does not apply unless a caller on a taped line in a police station is first given express notice that the line is taped. The Seventh Circuit, however, was correct. The determinative factor is that the taping be "ordinary," not that it be preceded by express notice. The Seventh Circuit's opinion is consistent with the statute's language, with the purpose of the ordinary course provision of the Wiretap Act, and with the majority of the precedent. As a result, the Writ should be denied.

Petitioners alleged in the district court that the taping of 7799 violated § 2511(1) of the Wiretap Act, which prohibits the intentional "interception" of a telephone communication. A threshold for § 2511 to apply is that the communication be "intercepted," and the taping of a telephone call is not an interception when done by "a law enforcement officer in the ordinary course of his duties." 18 U.S.C. § 2510(5)(a)(ii).

The statute contains no express notice requirement for the exception to apply. As the Seventh Circuit observed, if the ordinary course exception required actual notice, it would overlap other provisions of the statute which remove from the statute's prohibition those calls taped with a caller's consent. *See* 18 U.S.C. § 2511(2)(c). If a caller has actual notice of the taping of a line, and speaks on that line anyway, how could it be argued that the caller did not a least impliedly consent to the taping?

The language of the ordinary course exception does not require express notice, it only requires that the taping be "ordinary." The Seventh Circuit convincingly explained what "ordinary" means under the exception:

> Investigation is within the ordinary course of law enforcement, so if "ordinary" were read literally warrants would rarely if ever be required for electronic eavesdropping, which was surely not Congress's intent. Since the purpose of the statute was primarily to regulate the use of wiretapping and other electronic surveillance for investigatory purposes, "ordinary" should not be read so broadly; it is more reasonably interpreted to refer to routine noninvestigative recording of telephone conversations. . . . Such recording will rarely be very invasive of privacy, and for a reason that does after all bring the ordinary- course exclusion rather close to the consent exclusion: what is ordinary is apt to be known; it imports implicit notice. To record all calls to and from a police department is, for the reasons explained earlier, a routine police practice. If "ordinary course" of law enforcement includes anything, it includes that.

(App. 5a-6a).

The Seventh Circuit's interpretation of the ordinary course exception was correct. It is the routine, administrative nature of the taping, which is distinct from an investigative surveillance targeted at a particular subject, that is the hallmark of the ordinary course exception, not express notice. This is consistent with prior Seventh Circuit decisions (*see e.g.*, *United States v. Feekes*, 879 F.2d 1562 (7th Cir.

1989); *United States v. Daniels*, 902 F.2d 1238 (7th Cir. 1990)), and consistent with the decisions of other courts confronted by the issue (*United States v. Cheely*, 814 F. Supp. 1430, 1442 (Dist. Alaska 1992), *aff.*, 36 F.3d 1439 (9th Cir. 1994) ("On close examination it is clear that it is the routine nature of the monitoring and recording that is crucial, and not the nature of the notice. Notice tends to confirm that the monitoring is routine. The adequacy of the notice only becomes a central concern when the issue is whether there is implied consent under § 2511(2)(c)."); *United States v. Green*, 842 F. Supp. 68, 73 (W.D. N.Y. 1994) ("In this case, however, the special attention paid to Donald Green's calls appear not at all routine or ordinary.")

Of course, what is ordinary will depend on the circumstances, and a court could conceivably find, depending on the context, that notice is required for the taping to be "ordinary." For example, where prison regulations require notice before telephone calls could be taped, "ordinary" could require notice, and lack of notice could make the taping "unordinary." *See United States v. Sababu*, 89 F.2d 1308 (7th Cir. 1989); *Crooker v. United States Dept. of Justice*, 497 F. Supp. 500 (D. Conn. 1980). That is precisely what was behind the so-called "majority analysis" discussed in the petition. However, a per se express notice requirement for application of the ordinary course exception is certainly not the "majority rule." On the contrary, it has never been recognized.

Petitioners' per se express notice rule cannot be correct — it would invalidate police taping systems around the country. The taping of 7799, at least according to respondents' version of the facts, which the jury credited, is precisely the type of taping that the ordinary course exception

contemplated. The court in *Jandak v. Village of Brookfield*, 520 F. Supp. 815 (N.D. Ill. 1981), discussing a taping system identical to the system used to tape 7799, observed the following:

> Police departments commonly have recording systems like that of defendants, due to the need to preserve and be capable of accurately recalling messages pertaining to emergencies or to official police business. To further these purposes, defendants engaged a communications common carrier to install a recording system, to record emergency and investigative calls, as an integral component of the communications system used by the police department in performing its duties to the public. Such a system indiscriminately and routinely records all activities on established designated lines, and is not comparable to the selective use of recording equipment to eavesdrop on a normally unmonitored telephone system in order to record specifically selected communications. There is little doubt that Congress did not intend the statute to apply to routine recording of emergency and investigative calls as an integral component of a police station telephone system like that of defendants.

520 F. Supp. at 822. How could these standard police taping systems operate if express notice to every caller were required? Are all taped police lines required to have audible beep tones? Even then, beeping a telephone line does not necessarily put a party on notice that the line is taped. *See e.g.*, *PBA Local No. 38 v. Woodbridge Police Dept.*, 832 F. Supp. 808 (D. N.J. 1993). Evidence was presented at the

trial that beeping a police line can interfere with transmissions, and there are legitimate police business needs for unbeeped, taped police lines. If the only way to comply with the exception were to beep lines, it would be expected that Congress, in enacting a comprehensive regulatory scheme, would have said so. It would have been easy enough to require a beep tone, rather than the ordinary course of business, for the exception to apply.

Of course, the *Jandak* court discussed a need for notice, but not the express notice petitioners argue they should have received. The court in *Jandak* concluded that because some employees knew the line was taped, the plaintiff, the secret paramour of a police officer, should have known. If *Jandak's* concept of notice is what the statute requires, it was satisfied here. But in *Jandak*, notice was inferred because of the routine, indiscriminate taping of the line.

The petition attempts to alarm the Court about the dangers of a "premises-based" exception to the Wiretap Act created by the Seventh Circuit's opinion. The Seventh Circuit's opinion, however, in no way announces any type of a "premises-based" approach. The opinion focuses on the proper standard to be applied under the exception, whether the taping was "ordinary," for the purposes Congress contemplated in carving out the exception, in that it was done routinely, without being targeted at a particular individual or investigation, or done to intimidate the users of the line. Under the Seventh Circuit's analysis, if the evidence warranted a conclusion that the taping of a telephone line on police premises was done under circumstances that were not "ordinary," then the exception would be inapplicable.

Finally, petitioners complain that the privacy interests of the Wiretap Act suffer under the Seventh Circuit's analysis. As the Seventh Circuit properly pointed out, however, although privacy is a major the concern of the Wiretap Act, it is not the only concern. The Wiretap Act is a broad based regulation. Under the statute's one party consent exception (18 U.S.C. § 2511(2)(c)), the privacy interests of the non-consenting party become subordinate to the statute's broader regulatory purpose. The same is true of the law enforcement exception. Moreover, no privacy should have been expected on 7799, as the jury's conclusion that there was no Fourth Amendment violation demonstrates. Petitioners' had no privacy interest on this line, since its designated purpose, though maybe not in petitioners' view, was not for privacy, but for police business, and the taping was done openly, rather than secretly.

Petitioners also complain that the Seventh Circuit's emphasis on the routine nature of the taping triggering the exception is inconsistent with this Court's opinion in *United States v. Giordano*, 416 U.S. 505, 94 S. Ct. 1820 (1974) ("The Supreme Court has held that wiretapping should not be a routine procedure." Petition at 12). In *Giordano*, this Court observed that an attempt to obtain judicial authorization of a wiretap should be "used with restraint and only where the circumstances warrant the surreptitious interception of wire and oral communications. These procedures were not to be routinely employed as the initial step in criminal investigation." 416 U.S. at 515. There is no inconsistency between the Seventh Circuit's opinion here and the court's observation in *Giordano*. The routineness emphasized by the Seventh Circuit is what establishes the non-investigative nature of the taping, that is, taping done indiscriminately, under circumstances not designed to target

a particular individual, communication, or investigation. In *Giordano*, the court was concerned about tapings in criminal investigations, under circumstances where law enforcement officers routinely seek judicial authorization to engage in wiretapping without establishing in the application for the authorization that other investigative procedures were insufficient. Again, the crucial distinction is that the taping here occurred in an administrative, non-investigative setting, while in *Giordano* the purpose of the taping was to obtain evidence against targeted individuals. The jury rejected petitioners' assertion that the latter situation existed here, and under respondents' version of the facts, the Seventh Circuit's finding that the ordinary course exception applied was proper. As a result, the Writ should be denied.

II. THE WRIT SHOULD BE DENIED ON THE QUESTION OF WHETHER A MUNICIPALITY CAN BE HELD LIABLE UNDER § 2511(1)(a) OF THE WIRETAP ACT, BECAUSE THE SEVENTH CIRCUIT'S ONE LINE OBSERVATION THAT MUNICIPALITIES ARE NOT LIABLE UNDER THE WIRETAP ACT WAS DICTUM, AND NOT SUBJECT TO REVIEW IN THIS COURT, AND IN ANY EVENT A CORRECT INTERPRETATION OF THE STATUTE NOT IN CONFLICT WITH OTHER CIRCUITS.

A. The Court's Observation Was Mere Dicta

The district court found that respondent Woodstock, an Illinois municipality, could not be held liable under § 2511(1) of the Wiretap Act, because it was not a "person" under that provision. Therefore, the district court dismissed Woodstock prior to the case going to the jury. The jury then returned a verdict in favor of the remaining respondents, finding no

violation of the Wiretap Act. On appeal, the Seventh Circuit affirmed the district court's judgment that there was no violation of the Wiretap Act. In doing so, the Seventh Circuit observed that "[t]he plaintiffs also complain about the dismissal of the City of Woodstock as a defendant, which was, however, proper, because Title III does not allow for suits against municipalities. 18 U.S.C. § 2510(6)." (App. at 7a) Petitioners challenge this conclusion, but their argument is aborted from any practical effect. The verdict, judgment and appellate decision were all in favor of respondents. There was no violation of the Wiretap Act. Therefore, whether a municipality could be found liable under the Wiretap Act is of no moment. The court does not review abstract issues disconnected from the facts below. *California v. Rooney*, 483 U.S. 307, 107 S .Ct. 2852 (1987), *reh'g den.*, 108 S. Ct. 30 (1987); *Atchison, Topeka & Santa Fe R.R. v. Buell*, 480 U.S. 557, 107 S. Ct. 1410 (1987). Without a finding that a Wiretap Act violation occurred, whether Woodstock could be liable for a violation is unreviewable. Therefore, the Writ should be denied.

B. In Any Event, The Seventh Circuit Was Correct In Concluding That Municipalities Are Not Liable Under § 2511(1) Of The Wiretap Act, And The Decision Is Not In Conflict With Other Circuit Decisions

Section 2511(1) of the Wiretap Act states that any "person" who engages in the acts prohibited under the statute is subject to criminal and civil responsibility under the Act. 18 U.S.C. § 2511(1). "Person" is defined in § 2510(6) of the Act as "[a]ny employee, or agent of the United States or any state or political subdivision thereof, and any individual, partnership, association, joint stock company, trust or corporation." 18 U.S.C. § 2510(6).

Section 2520 of the Act provides a remedy for violations of various provisions of the statute. In 1986, the Wiretap Act was extensively amended. Section 2511(1) of the Act was amended to require that an intentional, rather than a wilful, state of mind would violate the Act. In addition, § 2511(3)(a) added a provision for various disclosures by providers of electronic communications services to the public. That provision was amended to prohibit such disclosures by "any person or entity. . . ." Section 2520 of the Act was also amended to allow for civil damages against any "person or entity" found in violation of any of the substantive provisions of the statute. There was no amendment to § 2511(1) to include "person or entity" within the class potentially liable for violating the Act, and the definition of "person" under § 2510(6) was also unchanged.

Petitioners argued in the district court that respondent Woodstock, as a municipality, could be held responsible for violations of the Wiretap Act by its agents, notwithstanding that the definition of "person" under § 2511(1) excluded governmental agencies. Petitioners argued that the amendment to § 2520(a) as a result of the 1986 amendments, adding the term "entity" to the remedy provision of the Act, indicated an intent to include municipalities within the § 2511(1) prohibition. The district court rejected the argument, concluding that the amendment to § 2520(a) was meant to encompass those substantive provisions of the statute in which entities could be found responsible for violations of the Wiretap Act. The court concluded that because § 2511(1) was not amended to prohibit the actions of entities, but remained applicable only to "persons," and the definition of "persons" was not changed to include governmental agencies, that Woodstock could not be held responsible under the Act.

The Seventh Circuit agreed with that conclusion. Petitioners now seek review of that conclusion, arguing that it was incorrect and inconsistent with other circuit decisions. However, the Seventh Circuit's conclusion was neither incorrect nor inconsistent with other circuit court decisions. It is true that three district court opinions agreed with petitioners' interpretation of the statute. However, all three of these decisions suffered from the same error into which petitioners' attempted to draw the Seventh Circuit. The three opinions focused on § 2520, concentrating on its language in isolation. Neither petitioners nor any of the cited district court cases considered that § 2520 was only the remedial tail following upon the violation of the substantive provision, § 2511(1), which imposed the duty to refrain.

One cannot sue for a violation of § 2520. The suit must be founded on a violation of a substantive provision of the statute. The civil damages part of the Wiretap Act is a tort statute. *Awbrey v. Great Atlantic Tea Co., Inc.*, 505 F. Supp. 604 (N.D. Ga. 1980). As with any tort, a defendant can only be liable for breaching a duty that was imposed upon it.

Petitioners based their claims here on § 2511(1). If they could recover at all against respondent Woodstock, it had to be on that basis. That provision, however, applied only to "persons," and Congress carefully defined "person" as "any employee or agent of the United States or any state or political subdivision thereof," but deliberately left the employing entities themselves out of the definition. In commenting on its definition of "person," Congress noted the definition's applicability to the entire chapter, and stated "[t]he definition explicitly includes any officer or employee of the United States or any State or political subdivision of a State. . . . Only the governmental units themselves are

excluded. . . . Otherwise, the definition is intended to be comprehensive." S. Rep. No. 1097, 90 F. Cong. 2d Sess. (1968), *reprinted in* U.S.C.C.A.N. 2112, 2179.

Taking the language of the Act as its guide, the substantive provision of the statute must be analyzed first. Between the word "person" and the word "entity," only the word "person" was specifically defined by Congress, and appears in § 2511(1). Congress added "entity" to the remedy provision as a result of its 1986 amendments, but Congress also added other provisions which did impose liability upon governmental entities. Nevertheless, it did not change the language of § 2511 to impose that section's restrictions on "entities." The district court's own language explained this reasoning best.

> There was no provision comparable to § 2511(3)(a) in the original statute. *See* 18 U.S.C. § 2511. No other provision of § 2511 contains the "person or entity" language. Nevertheless, to maintain consistency with the alternative language contained in § 2511(3)(a), it would have been necessary for Congress to have placed similar language in the remedial provisions of § 2520, which it did. Thus, there exist a reasonable explanation for the addition of the word "entity" in § 2520 which is short of a Congressional intent to amend the statute to include local governmental entities as potential defendants. Furthermore, in view of this likely explanation for the inclusion of the term "entity," it cannot properly be considered superfluous.

(App. at 33a).

This Court has often urged a holistic approach to statutory interpretation. *International Primate Protection League v. Administrators of Tulane Education Fund*, 500 U.S. 72, 79, 111 S. Ct. 1700, 1705 (1991) ("We continue to recognize that context is important in the quest for [a] word's meaning," (Citation omitted), and that "statutory construction. . . . is a holistic endeavor.") *Accord*, *United States v. Bonanno Organized Crime Family of La Cosa Nostra*, 879 F.2d 20, 24 (2nd Cir. 1989) ("In ascertaining the proper construction of a specific statutory provision, it is also appropriate and helpful to view the disputed language in context; that is, to interpret the specific provision in a way that renders it consistent with the tenor and structure of the whole act or statutory scheme of which it is a part.") The conclusion of the district court, upheld by the Seventh Circuit, conforms to the holistic approach. It also heeds this Court's admonition that "where Congress includes particular language in one section of a statute, but omits it in another section of the same act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23, 104 S. Ct. 296, 300 (1983).

Other than the three district court cases which make the same mistake petitioners attempt to perpetrate here, no other appellate level case agrees with petitioners' argument. It is conflicts between the circuit courts that concern this Court (Sup. Ct. R. 10), and no such conflict exists. Petitioners cited to two other circuit court cases, but they do not support petitioners' argument. The Seventh Circuit's opinion in *Davis v. Zirkelbach*, 149 F.3d 614 (7th Cir. 1998), affirmed a grant of summary judgment in favor of the defendant City of Evansville under the Wiretap Act. In doing so, the court did not consider, analyze or decide the issue at bar. *Davis*

specifically found that "the City of Evansville did not itself engage in a violation of the Federal Wiretap Act." *Id.* at 620. However, whether the City of Evansville was a "person" under the Act was never argued or decided. No case stands as precedent for a matter that it did not analyze and decide. *In Re Stegall*, 865 F.2d 140 (7th Cir. 1989); *United States v. Kucik*, 844 F.2d 493, 498 (7th Cir. 1988). *Davis* is not a precedent that is inconsistent with the Seventh Circuit's observation here.

The other appellate level case petitioners attempt to harness as support for their position is the Second Circuit's decision in *Organizacion J. D. Letda v. United States Department of Justice*, 18 F.3d 91 (2nd Cir. 1994), *cert. denied*, 512 U.S. 1207 (1994). This case, however, cannot support petitioners' argument, because it found the Wiretap Act inapplicable. *Id.* at 94. *Organizacion* focused on a different chapter that was also added to the statute in 1986, 18 U.S.C. § 2701 *et seq.*, addressing electronically stored information. The holding in *Organizacion* is no more extensive than: "We . . . hold that governmental "entities" are subject to liability under § 2707(a)." *Id.* at 95. That provision, however, was never at issue here.

Viewed as a whole, the intention of Congress was not to impose liability directly on governmental entities, but only on persons as defined. If Congress had intended to cover governmental entities directly, it would have so stated, as it clearly did in the stored information provisions of 18 U.S.C. §§ 2701-2707. But if there were any doubt, § 2511 is a predicate, not only for civil damages, but also for penalties and imprisonment. It is a penal statute. *Western Casualty Surety Co. v. City of Palmyra*, 650 F. Supp. 981 (E.D. Missouri 1987); *Kratz v. Kratz*, 477 F. Supp. 463 (E.D. Pa.

1979). Penal statutes are to be construed narrowly, with all doubts being resolved to the defendants' benefit. *United States v. Lam Kwong-Wah*, 924 F.2d 298, 305 (D.C. Cir. 1991). Both the district court and the Seventh Circuit were correct in concluding that a municipality is not a "person" under § 2511(1), and there is no appellate level case that disagrees with this conclusion.

CONCLUSION

As a result, the Writ should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

CHARLES AMATI, *et al.*,

Petitioners,

v.

CITY OF WOODSTOCK, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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S. Rep. No. 1097, *reprinted in* 2 U.S. Code Cong. & Admin. News 1968, 90th Cong., 2d Sess. 5

I. Respondents Fail To Address Petitioners' Issues On Appeal, And Instead, Misrepresent And Mischaracterize Both The Petition And The Facts Of The Case.

Respondents' Brief is materially unresponsive and interjects issues and matters not raised in the Petition for Writ of Certiorari (hereinafter "Petition"). Respondents mischaracterize the true issues before the Court, and after doing so, construct arguments to overcome the altered issues they themselves have raised. First they stand the straw man up, then they knock him down. At the same time, Respondents ignore important issues actually contained in the Petition. Most significantly, Respondents make serious factual misrepresentations to the Court, which are devoid of any support in the record. Petitioners herein base their entitlement to Judgment as a Matter of Law (hereinafter "JMOL") upon the uncontested facts contained in the record.

A. Personal Calls Were Allowed On 7799

For the first time, on appeal to the Supreme Court, Respondents now claim that employees were actually prohibited from making personal calls on the 7799 line. There is absolutely no evidence in the record to support such a contention. Instead, the record is replete with evidence that employees were told, trained, and otherwise encouraged to use 7799 to make their personal calls. For example, in December of 1982, William Patrick, Chief of the Woodstock Police Department, published unequivocal notice to all police department employees telling them:

> As you know, all the telephone lines are taped with the exception of 338-7799. The line was intentionally left untaped to allow for personal calls, however, we request that you keep those calls brief and to a minimum. This policy will take effect immediately and be strictly adhered to.

(Trial Exhibit 70).

Later, in 1985, Respondent Herbert Pitzman, then Chief of the Woodstock City Police Department, published the "Woodstock City Police Department Dispatch and Records Procedure Manual." The Manual, which was used to train telecommunications and records personnel, stated:

> 338-7799 calls will be answered with a simply [sic] greeting. (Unlisted number designated for Police Personnel's personal calls. Untaped line.)

(Trial Exhibit. #93).

In stark contrast to Respondents' sudden and novel proposition that personal calls were prohibited on 7799, Respondent Beu, former assistant chief, testified at trial that employees were allowed to make personal calls on any phone line within the police department. (Tr. 2020-2021). There was a policy statement expressly allowing personal phone calls on 7799 and employees were trained to use the line for their personal calls. Express notice was initially given that 7799 was intentionally left untaped for the designated purpose of allowing for personal calls. Thereafter, Respondent Pitzman authorized, approved, and published the training manual to Petitioners; Respondents cannot be heard to disavow its contents.

Respondents next assert that the Petition misrepresents the nature of the 7799 line as being dedicated exclusively for personal use by employees. However, Petitioners do not contended the 7799 line was limited solely to personal use. Rather, the evidence proved that making and receiving personal phone calls was a permitted use of 7799, and that Respondents directed, trained, and encouraged employees to make their personal calls on 7799 under the pretext that the line was unrecorded.

B. Miscellaneous Unresponsive Issues

Respondents deny actively misleading Petitioners into believing that 7799 was untaped. However, Petitioners rely on Respondents' "intentional" interception as the only motive

necessary to state a cause of action under the Federal Wiretap Act (hereinafter "FWA"). Whether the Respondents had an additional "secret" motive to record Petitioners' personal phone calls is irrelevant because Respondents admit they "intentionally" recorded, listened to, and used the contents of Petitioners' personal conversations without Petitioners' knowledge or consent.

Respondents admit they gave no notice to the Petitioners that 7799 was being recorded. Remarkably, the Seventh Circuit found that it was sufficient that one or more Petitioners "may have known" of the recording. A "may have known" standard is no standard at all and is patently unreasonable. Furthermore, evidence that one Petitioner may have learned earlier than another that 7799 was being recorded is immaterial where, as here, the knowledge, if any, didn't accrue to any Petitioner until months after illegal recording occurred.

Still, Respondents suggest that Petitioners had no expectation of privacy in the 7799 line, that notice of recording was posted, and that Petitioners could have discovered the taping. First, there is no statutory requirement of an expectation of privacy in wire communications. 18 U.S.C. § 2511(1)(a); *Simpson v. Simpson*, 490 F.2d 803, 809 n.15 (5th Cir. 1974). Respondents also conveniently leave out the fact that their so-called posted notice of recording excluded reference to 7799 entirely. Finally, the FWA does not legitimize unlawful wiretapping simply because the wiretap victim failed to discover the tortious conduct. Not getting caught committing illegal conduct is not the equivalent of committing lawful conduct. Although Respondents minimize Petitioners' privacy interest in their personal calls, this Court acknowledged that the protection of privacy was an overriding Congressional concern in the adoption of Title III. *Gelbard v. United States*, 408 U.S. 41, 92 S. Ct. 2357, 2361 (1972).

Finally, Respondents hypothesize that the Petitioners' real contention is with the propriety of the jury instructions. However, whether jury instructions were proper does not resolve the improper denial of JMOL, the true issue on appeal. The jury instructions serve only to demonstrate the District Court's misunderstanding of the required elements for a violation of § 2511(1)(a) of the FWA, a misunderstanding that predicated the trial court's wrongful denial of JMOL.

Respondents' focus on the jury verdict ignores the fact that the case should never have gone to the jury in the first place. Instead, based on the uncontested facts, the District Court should have granted Petitioners' Motion for JMOL. Likewise, but for an improper departure from Federal Wiretap Act jurisprudence by the Court below, the Seventh Circuit should have entered Judgment as a Matter of Law on appeal.

II. Respondents Are Not Entitled To The Law Enforcement Exemption.

The Seventh Circuit should have granted the law enforcement exemption only after satisfaction of the three-factor analysis used by the consensus of Federal courts. The Court below should have factually analyzed the quantum of notice that 7799 was wiretapped, whether there was a legitimate purpose for the wiretap, and the character of the intercepted conversations. (Citations in Petition for Writ of Certiorari, pp. 9-10). The need for a factual analysis was particularly evident here, where express notice was provided to the contrary, informing the line's users that 7799 was untaped.

Respondents admit they gave no notice whatsoever to inform users that the 7799 line was recorded, they neither sought nor received Petitioners' consent to record, and they concede they made no attempt to rectify the general belief that 7799 was untaped. Under the majority analysis, consideration of Respondents' entitlement to the law enforcement exemption would end here. Also, contrary to Respondents' thinking,

Petitioners do not contend that express notice is required for the law enforcement exemption to apply. But, where express notice is provided that a phone line is untaped, subsequent taping cannot be legitimized by an unsupported finding of fact that recording all calls to and from a police department is a routine, hence ordinary, hence exempt police practice.

The evidence clearly showed that the 7799 line was unrecorded for a decade, that Respondent Pitzman and Beu's private phone lines were always unrecorded, and that numerous other local police departments maintained private telephone lines at their police departments too. (Trial Exhibit 91). Given this evidentiary background, the Seventh Circuit's finding of fact that it is routine, hence ordinary, to record *all* calls to and from a police department, was against the manifest weight of the evidence. Moreover, their conclusion of law was built upon their erroneous finding of fact, that a law enforcement officer's recording of all phone lines at a police station is exempt from the FWA. Because the resulting rule of law was built upon a false predicate, it cannot stand.

Title III prohibits the utilization of wiretapping and bugging by all public officials where there is no compelling law enforcement need. S. Rep. No. 1097, *reprinted in* 2 U.S. Code Cong. & Admin. News 1968, 90th Cong., 2d Sess., at p. 2264. However, Respondents admit there was no investigative or police purpose served by recording the Petitioners' personal conversations on 7799. Consequently, their conduct is prohibited by Title III.

The purpose of the FWA was to prohibit all interceptions of oral and wire communications, except those provided for in the FWA; there is a clear statutory intent for wiretapping to be used with restraint. *United States v. Giordano*, 416 U.S. 505, 514-515, 94 S. Ct. 1820 (1974). Nonetheless, Respondents suggest that *Giordano* should not be followed when interpreting the law enforcement exemption. Although they admit that

Giordano prohibits indiscriminate tape recording in order to obtain evidence against targeted individuals, Respondents urge that *Giordano*'s prohibitions should not be applied where indiscriminate recording occurs first and individuals are targeted afterward. The Respondents' theory poses an unacceptable risk of pretextual eavesdropping.

The Woodstock Police Department intercepted and taped months of personal and/or privileged calls. The evidence showed that while Respondents were recording 7799, the line was also being used by arrested persons to call their attorneys. Recordings also captured confidential informants talking to their police contacts and calls between employees and their spouses. The evidence also proved that Respondents recorded and listened to calls concerning union matters. The FWA imposes an affirmative duty not to intercept personal or privileged calls using a wiretap. (Citations in Petition for Writ of Certiorari, p. 15). Respondents ignored that duty. Not only were personal calls recorded, they were listened to by the Respondents, and their contents were used by Respondents as a basis to reprimand employees. Respondents' use of the contents of personal conversations on 7799 ultimately led to Petitioners' discovery of the taping.

A. Premises-Based Exemption From FWA Liability

The opinion below construes the law enforcement exemption in terms of "premises-based immunity." The Seventh Circuit replaces the three-factor majority analysis with a wholesale "premises-based" exemption. The opinion below grants the law enforcement exemption to the recording of any phone call to or from a police department, regardless of notice, regardless of content, and regardless of the motive for recording the calls.

The Seventh Circuit found that it is routine and hence ordinary for all calls to and from a police station to be taped. (App. A Petition for Writ of Certiorari, p. 6a). The court found

further that taping all such calls falls within the ordinary course of law enforcement. *Id.* However, the Seventh Circuit's conclusion that it is routine to record all calls to and from a police station is against the manifest weight of the evidence. Trial evidence established that both Respondents, Pitzman and Beu, kept separate unrecorded telephone lines in their offices at the police department, that were available for their exclusive use. Obviously, it was not routine to record *all* calls to and from the Woodstock police station.

III. The Seventh Circuit's Holding That "Title III Does Not Allow For Suits Against Municipalities" Was A Substantive Ruling Going Directly To An Issue On Appeal.

On appeal to the Seventh Circuit, the Petitioners raised the issue of the District Court's dismissal of the City of Woodstock as a defendant under the FWA claims. The opinion below affirmed Woodstock's dismissal, finding that Title III does not allow for suits against municipalities. (App. A Petition for Writ of Certiorari, p. 7a). This holding was not dicta, as Respondents contend; it was a dispositive ruling on a substantive issue on appeal. The fact that the Seventh Circuit provided no citation for its proposition does not render the ruling "dicta". The need for Supreme Court review of this issue is apparent from the division among the Circuits whether a municipality is a proper defendant under Title III.

A. The Privacy Act of 1986 Authorized Municipal Liability Under Title III

Respondents contend that the term "person" under § 2511(1) excludes governmental entities. If this were 1968, Respondents would be correct. However, Congressional intent evolved between 1968 and 1986. The clear legislative intent of the sweeping amendments brought about in the Privacy Act of 1986 was to bring governmental entities, including municipalities, within the ambit of the statute's protections.

See Tucker v. Waddell, 83 F.3d 688 (4th Cir. 1996). The logical catalyst for this change was the Supreme Court's decision in *Monell v. New York City Department of Social Services*, 436 U.S. 658 (1978). *Monell* changed the tenor of Congressional thinking and established a mechanism to visit liability directly upon a municipality where the injury results from the policy of the municipality. *Id.* In *Davis v. Zirkelbach*, 149 F.3d 614 (7th Cir. 1998), *cert. denied*, 119 S. Ct. 902, the Seventh Circuit correctly employed a *Monell* analysis to establish municipal liability under the FWA.

The District Court improperly dismissed the City of Woodstock whose policy-makers ordered the taping of the Petitioners' private calls. On appeal, the Seventh Circuit affirmed holding that a municipal entity could not be sued under Title III. This finding flatly conflicts with express congressional intent for Title III to apply to governmental entities. S. Rep. No. 99-541, 99th Cong. 2d Sess., *reprinted in* U.S. Code Cong. & Admin. News, 3555, 3597; H.R. Rep. No. 647, 99th Cong., 2d Sess. 74 (1986).

Respondents contend that *Zirkelbach*, *supra*, did not establish municipal liability for a violation of the FWA. However, the *Zirkelbach* Court, citing to *Monell*, stated unequivocally that the same principles of respondeat superior that govern entity liability under Sec. 1983 should be applied to the Federal Wiretap Act. *Zirkelbach*, 149 F.3d 614, 621 (7th Cir. 1998).

Although not cited in the Petition, Respondents distinguish *Organizacion J.D. Letda v. United States Department of Justice*, 18 F.3d 91 (2nd Cir. 1994), *cert. denied*, 512 U.S. 1207, on the basis that the Court only found that civil liability existed for governmental incursions into stored electronic communications under § 2707 of Title III. Respondents' acknowledgment of municipal liability under Title III in *Organizacion J.D. Ledta*, is curious, given their reliance upon the Seventh Circuit's edict

that municipalities cannot be sued under Title III. It is inconsistent to argue that governmental entity liability exists under § 2707 for the interception of stored electronic communications such as e-mail, yet at the same time argue that no governmental liability attaches for interception of private telephonic conversations under § 2520. *See Tucker v. Waddell*, 83 F.3d 688 (4th Cir. 1996). The evil incident to invasion of the privacy of the telephone is far greater than that involved in tampering with the mails. *Olmstead v. United States*, 277 U.S. 438, 48 S. Ct. 564, 571 (1928) (Brandeis, J., dissenting).

B. Changes Brought About By The Privacy Act of 1986

Title III was amended by the Privacy Act of 1986. Congress amended the Federal Wiretap Act and introduced the Stored Wire Communications Act within the framework of the statute, using identical language in both Acts to allow for private civil actions against any "person or entity". Federal courts who have addressed this issue have noted that the term "entity" was intended to include municipalities since other provisions of Title III already allowed for private civil suits against any other type of defendant. *Tucker v. Waddell*, *supra*; *Dorris v Absher*, 959 F. Supp. 813, 820 (M.D. Tenn. 1997). The 1986 amendments implement Congress' overall purpose to strictly limit warrantless wiretapping by allowing private causes of action against violators of the Federal Wiretap Act.

CONCLUSION

The Supreme Court interpreted the Federal Wiretap Act in *United States v. Giordano*, 416 U.S. 505, 94 S. Ct. 1820 (1974), finding that Congress evinced a clear intent that statutory authority for wiretapping be used with restraint. *Id.* at 514-515. Wiretapping should not be a routine procedure and the exceptions should be read narrowly. *Id.* The Federal Wiretap Act should provide a prophylactic protection against warrantless wiretaps. *Id.* In the opinion below, the Seventh Circuit departed from the Supreme Court's teachings in *Giordano*, and gave broad effect to the law enforcement exemption.

The *Amati* court below fully immunized the routine recording of personal calls to and from all police departments, ignoring the fact in the instant case that the users of the line had been told for a decade that the line was untaped and were never advised otherwise. The court expanded the law enforcement exemption and in doing so provided blanket sanctuary to eavesdroppers at police stations. The Seventh Circuit went on to shield governmental entities entirely from any liability whatsoever under Title III. The Seventh Circuit's opinion pierced the prophylactic protections of the law.

In *Monell*, the Supreme Court outlined the mechanism to establish municipal liability for injuries caused by municipal policy. In *Zirkelbach*, the Seventh Circuit properly followed this Court's example in *Monell* and applied the same analysis to assess municipal liability under the Federal Wiretap Act. In *Amati* below, the court ignored the *Monell-Zirkelbach* analysis in favor of a standardless, premises-based exemption from FWA liability for police stations.

The opinion below found a prima facie violation of § 2511(1), but for an application of the law enforcement exemption. (App. A Petition for Writ of Certiorari, p. 2a). Absent misapplication of the law enforcement exemption, a prima facie violation of § 2511(1) would remain. Therefore, when a proper analysis is applied to Petitioners' case, the law enforcement exemption does not apply and a civil remedy is available to Petitioners under § 2520.

By granting the Petition for Writ of Certiorari this Supreme Court may resolve the division among the circuits over the proper analysis for application of the law enforcement exemption, harmonize the split among the circuits regarding municipal liability under the Federal Wiretap Act, and restore the integrity of the Federal Wiretap Act's protections.

Respectfully submitted,

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